TABLE OF CONTENTS

I. Introduction

A. Background to These Proceedings

Group consideration of a post-entry performance plan began in August 2000, with the creation of a collaborative process by the Qwest Regional Operating Committee (ROC). Eleven of the 14 state public service commissions with responsibility for regulating Qwest local exchange service invited interested parties to participate in a "ROC PEPP collaborative." The PEPP Collaborative process included five multi-day workshops, a number of conference calls from October of 2000 to May of 2001, and numerous exchanges of proposals, supporting data, and other information designed to seek the creation of a consensus plan. The PEPP Collaborative participants included staff members, AT&T, WorldCom, Z-Tel, McLeod, Eschelon, other CLECs, Southwestern Bell and Qwest.[1]

The statistical methods and the payment structure of the Texas PAP approved by the FCC served as the starting point for the PEPP collaborative. The collaborative reached agreement, however, that benchmark measures would change from a statistical approach to a direct "stare and compare" method. The PEPP collaborative also agreed to change a number of the statistical methods applicable to the parity measures. The QPAP adopted the two-tiered Texas payment approach, under which Tier 1 payments go to CLECs and Tier 2 payments go to the states. The QPAP also changed the Texas approach by adding to the payment escalation method (for consecutive months of missed performance) a corresponding stepped de-escalation process. The QPAP also eliminated the Texas plan payment caps on individual performance measures (excepting billing), restructured collocation payments, and raised Tier 1 performance measures classified as "medium" to "high."[2] The QPAP differs from the Texas plan in a number of other respects as well.

These multi-state 271 workshops have been proceeding in parallel with the activities of the PEPP collaborative. After it appeared in May of 2001 that further PEPP Collaborative efforts were in substantial doubt, the seven commissions then participating in these multi-state workshops decided that the section 271-affecting aspects of the performance assurance plan expected to be filed by Qwest (QPAP) would best be considered in these workshops. Later, the commissions of Nebraska and Washington also decided to participate in these workshops, insofar as they would address the public-interest aspects of the QPAP. Our multi-state 271 workshop scope now includes consideration of the QPAP in the 271 context.

A telephonic procedural conference ensued on August 3, 2001. We solicited participation in that conference through an e-mail invitation that was sent to the service lists being used for these workshops and for the PEPP Collaborative. There was broad participation in that procedural conference, which included state commission staffs, CLECs, and public counsel not already involved in the workshops. Most of the new participants were either involved in the PEPP Collaborative efforts, or in 271 proceedings before the Washington or Nebraska commissions; however, some either had been

[1] Qwest Initial PAP Brief at page1.
[2] Qwest Initial PAP Brief at page 5.

inactive participants in these workshops or sought intervention in them after the decision to include QPAP consideration in our scope.

The results of that conference were used to establish a set of procedures and schedule for producing a report that would provide the nine commissions with a series of proposed conclusions and recommendations addressing the public interest issues raised by the QPAP. The procedures allowed all participants to file comments and testimony in response to the QPAP, which Qwest filed on or about July 16, 2001, and in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled for and held during the weeks of August 13, and August 27, 2001. Those hearings included direct, rebuttal, and sur-rebuttal testimony. In all, 11 witnesses testified during seven days of hearings. We heard testimony from Carl Inouye, Michael Williams, Karen Stewart, and Nancy Lubamersky of Qwest, George Ford of Z-Tel, John Finnegan of AT&T, Chad Warner of WorldCom, Marlon Griffing of the New Mexico Advocacy Staff, Rex Knowles of XO Utah, Tim Kagele of Time Warner, and Timothy Peters of ELI. Main briefs, due to be filed by September 13, 2001, came from the Wyoming Consumer Advocacy Staff, Washington Public Counsel, Z-Tel, Covad, ELI/Time Warner/XO Utah, New Mexico Advocacy Staff, WorldCom, AT&T and Qwest. Reply briefs, due by September 20, 2001, came from the Wyoming Consumer Advocacy Staff, Z-Tel, Covad, ELI/Time Warner/XO Utah, New Mexico Advocacy Staff, WorldCom, AT&T and Qwest.

B. Significance of PEPP Collaborative Results

The evidence here demonstrates that the PEPP Collaborative process was comprehensive, well conducted, subject to wide participation, and thorough in addressing the broad range of issues and subjects appropriate to a post-entry assurance plan of the type expected by the FCC. The participants, despite their widely diverging views and mutual impatience with each other's positions, evidently succeeded in reaching a large number of agreements. Our purpose here was not to revisit agreements already made. Neither was it to provide an open forum for introducing propositions or arguments that had not been raised before but should have been, considering the comprehensive and open nature of the PEPP Collaborative process.

We did not establish a firm rule that would preclude new or inconsistent positions or proposals; however, we did inform the parties that such positions or proposals would require a strong showing of propriety and need, lest we risk disrupting important balances reflected in provisions agreed to either unanimously or nearly so in the PEPP collaborative process. Clearly, where agreement was reached through compromise, we needed to be careful not to support an improvement in what party got without considering what had been given in return. This report largely addresses issues on their individual merits, but there are a significant number of cases where maintaining the general balance that resulted from the PEPP collaborative contributed to conclusions and recommendations.

Where a participant could show that substantial or complete agreement was reached during the efforts of the collaborative, we gave that agreement significant but not

determinative weight, when examining previously unraised proposals or positions in opposition to those taken earlier. At the time of that ruling, it appeared from the last report issued by those administering the PEPP Collaborative process[3] that there was a comprehensive and fairly complete listing of the areas where agreement was reached and of the areas where disputes remained. However, the evidence in the workshops made it clear that the collaborative process reached an abrupt end, with no ability to conclude with certainty that it had yet run its full and natural course with respect to allowing new issues to be raised. It also became clear from the evidence that the report, while clear and well prepared, did not reach the level of underlying detail that proved necessary to explore fully all of the numerous and complex subject areas involved.

There was also significant change still taking place at the close of the PEPP Collaborative efforts. As AT&T noted, the PEPP collaborative not only left many issues unresolved, but its progress was halted abruptly -- just two days after Qwest submitted a new PAP proposal. Moreover, the QPAP filed by Qwest in these proceedings contains material changes from that last one provided to the PEPP collaborative.[4]

C. Scope of These Proceedings

ELI/Time Warner/XO Utah argued that we should conduct separate workshops to develop detailed QPAP language, much as we have been doing with respect to the SGAT in the 271 workshops, citing the fact that even Qwest does not even know what all of the language means.[5]

Discussion: We have heard detailed evidence and argument about the QPAP's objectives, approaches, and implementation details. We consider the record sufficient to allow a reasonably full understanding of what the language of the QPAP will accomplish and how, should it be adopted. Certainly the parties commented on the document at a very fine level of detail when there were provisions of concern to them. It was clear in the rules governing this proceeding that all issues of concern were includable in comments, testimony, and argument. Certainly, the conduct of all the parties appeared to reflect an understanding of those rules. Moreover, we allowed all participants to seek from Qwest interpretations of any language considered vague, contradictory, or otherwise of concern.

The fact that no one Qwest witness could speak to the meaning of all the QPAP's provisions is testament not to its vagueness, but to its breadth and complexity. We find the record adequate to render conclusions on all material issues respecting the document's satisfaction of the relevant portion of the public interest test to which the FCC subjects 271 applications. We do not find language or drafting workshops to be necessary or appropriate.

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[3] *Post Entry Performance Plan Final Collaborative Summary*, June 5, 2001, Maxim Telecommunications Group (MTG) and the National Regulatory Research Institute (NRRI), introduced as Exhibit S9-ATT-JFF-5.

[4] AT&T Reply PAP Brief at page 2.

[5] ELI/Time Warner/XO Utah Initial PAP Brief at page 3.

II. Standard of Review

The FCC sets forth five general characteristics as part of its "zone of reasonableness" test for evaluating a section 271 performance assurance plan:[6]

- Meaningful and significant incentive to comply with designated performance standards
- Clearly articulated and pre-determined measures and standards encompassing a range of carrier-to-carrier performance
- Reasonable structure designed to detect and sanction poor performance when and if it occurs
- Self-executing mechanism that does not open the door unreasonably to litigation and appeal
- Reasonable assurance that the reported data are accurate

Qwest's reply brief argued that a number of CLECs strayed far from the FCC's established "zone of reasonableness" approach. Qwest accused them of arguing instead that the QPAP should be designed to assure a competitive post-entry local market or to maximize incentives for Qwest to comply with its wholesale service obligations. Qwest argued that it would be incorrect to approach the evaluation of a PAP's adequacy from the viewpoint that more is necessarily better. Qwest urged that payments not be set at a level that would encourage CLECs to seek windfall payments, to the detriment of investment in their own facilities.[7] Qwest argued that the FCC has repeatedly found similar BOC PAP proposals to fall within this zone of reasonableness standard.[8]

In supporting the overall reasonableness of its QPAP, Qwest cited the fact that it began the PEPP collaborative with the Texas plan as a starting point, and then changed it significantly and positively to address discussions occasioned by that collaborative. Qwest cited the following specific "improvements:"[9]

- Increasing payments by omitting the Texas plan's K-Table
- Providing less forgiving de-escalation of payments when non-compliant performance should improve
- Eliminating the caps on all individual performance measurements except for billing
- Restructuring collocation payments
- Raising Tier 1 "medium" measurements to "high"

The simple test in assessing the adequacy of the QPAP should, according to Z-Tel, be whether a recommended change would improve the incentives to provide conforming service.[10] In applying this test, Z-Tel would prefer "robust" procedures to "potentially

[6] Qwest Initial PAP Brief at page 2.
[7] Qwest Reply PAP Brief at page 2.
[8] Qwest Reply PAP Brief at page 3.
[9] Qwest Reply PAP Brief at page 3.
[10] Z-Tel Initial PAP Brief at page 6.

adequate" ones. Z-Tel said that the "only" appropriate standard to apply in examining CLEC-proposed changes to the QPAP is whether the changes would improve the goal of giving Qwest adequate incentive not to discriminate against CLECs, and that caps on payment levels are antithetical to creating such incentives.

Discussion: When Z-Tel says: "…the "only" appropriate standard to apply in examining CLEC-proposed changes to the QPAP is whether the changes would improve the goal of giving Qwest adequate incentive not to discriminate against CLECs…", Z-Tel overstates the case. While the logic behind their argument is economically sound, the FCC faces other constraints and public objectives other than this alone. In fact, the FCC has endorsed caps because in its judgment, caps are a reasonable compromise. The FCC has ruled that payment level caps are a necessary compromise for the development of workable PAP plans. Therefore, our task is not necessarily to decide how to increase incentives, our task is rather to design a workable plan that provides sufficient incentives to meet policy objectives. It is necessary to examine whether the options that Qwest and the participating CLECs have proposed will satisfy the requirements of the FCC and the public policy objectives which the Utah Public Service Commission must work toward as well.

Blind adherence to every aspect of approved plans is certainly not required, because this is a relatively new area of inquiry, even for the FCC. And, in view of the fact that the New York Public Service Commission has had to rewrite and raise certain penalty caps after the fact because of continued and grievous non-compliance on the part of the BOC indicates that perhaps a more strident level of penalty should be considered. It remains true that each plan addressed heretofore by the FCC, and the one before us, contains unique elements. Some give more to CLECs in some areas, and some give the BOC greater advantages in others. All presumably reflect the kind of balancing that results from cooperative efforts to develop them. As the CLECs have stated articulately and persuasively here, arguments that QPAP burdens on Qwest are equal to or greater than those of some other plan in some respect must be tempered by recognition of those areas where the QPAP eases burdens that BOCs elsewhere are bound to carry. The ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:

- Does it comport with the cornerstone elements common to previous plans existing under approved 271 applications
- Do the gives and takes that distinguish it from those other plans balance out on a net basis
- Does the plan provide adequate compensation for actual harm for which CLECs could reasonably expect to be compensated if their relationship with Qwest were more typical of commercial arrangements of similar size, complexity, and mutual risk and opportunity
- In the final analysis, will the plan (considering not just those elements designed to compensate CLECs for harm) provide sufficient incentive for Qwest to "continue to satisfy the requirements of Section 271 after entering the long distance market," as the FCC put it in paragraph 275 of the SBC Kansas/Oklahoma Order, after it may receive 271 approval

- Will the plan provide that incentive in a manner that does not place any more strain than is necessary on the sound principle that damages should bear a reasonable relationship to harm caused
- Do the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, InterLATA entry that it would be irrational for a BOC to pay for the privilege of such entry, recognizing that it is the expected value of potential payments that matters, not some theoretical maximum payment which is likely to never be realized
- Does the plan adequately respond to any unique circumstances proven by the evidence to be applicable here
- Are there administrative or procedural details in the plan that are not sufficiently functional, and that can be repaired without a major shift in balance

III. Summary of Recommended QPAP Changes

The following list summarizes the changes that this report recommends be made to the QPAP to make it sufficient to meet the applicable public policy.

Provisions for Changing the Cap
The hard 36 percent cap as proposed by Qwest is generally consistent with what exists in some other plans now in effect after FCC 271 approvals. However, in view of the fact that the New York Public Service Commission has found it necessary to readdress this issue in its existing PAP and increase that cap to 44% because of repeated non-compliance of the BOC, the lack of more substantial experience with PAP operation across the country suggests the propriety of allowing a balanced and limited span of variability in response to actual experience. As a result, the Utah staff recommends that the initial cap be set at 44% (as explained below). Further, if Qwest exceeds the 44% cap by at least 4 percentage points for any consecutive one 12-month period, the QPAP should provide for an increase of up to 4 percent in the cap, upon order of a state commission after notice and hearing.

Foreclosing Recovery for CLEC Harm Occurring Late in the Year
If the yearly cap is met before a CLEC is harmed, it will not get any recovery at all under the proposed QPAP, even though CLECs suffering harm earlier receive both base and escalated payments. The QPAP should be changed to create a mechanism that equalizes compensation to CLECs and the states under those circumstances. See the discussion under the *Procedural Caps* section of this report.

Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings
In seeking to preclude double recovery of damages and the ability to recover damages under other actions, the QPAP goes too far. It should be changed in a manner that will make it more clear that CLECs will be able to: (a) institute actions not based on contractual theories of liability and (b) avoid QPAP offsets for the portions of damages that was not awarded to compensate for contractual measures of damages. See the discussion under the *Preclusion of Other CLEC Remedies* section of this report.

Offsetting QPAP Payment Liabilities by Other Awards
The language of QPAP Section 13.7 requires change in order to assure that Qwest is not entitled to reduce QPAP payments on account of damage awards for injury to persons or physical property, even in cases where those awards arise from actions or omissions in providing wholesale service to CLECs. The language also needs to be changed in order not to undercut the ability of CLECs to recover non-contractual damages awarded in other allowed causes of action, as the preceding issue addresses in more detail. See the *Offset Provision (Section 13.7)* section of this report. A change to SGAT Section 5.8.1 is also required to prevent an inappropriate limit from being placed on Qwest's liability for injury to persons or physical property. (See the *SGAT Limitation of Liability to Total Amounts Charged to CLECs* section of this report.

Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith
It is appropriate that the QPAP set forth explicit provisions about CLEC bad faith. Nevertheless, QPAP Section 13.3 needs to be amended to avoid excusing Qwest performance in cases that do not actually constitute bad faith, but merely CLEC foresight regarding an inability of Qwest to perform as required. See the *Exclusions (Section 13.3)* section of this report.

Differing SGAT and QPAP Force Majeure Provisions
The QPAP and the SGAT include separate and somewhat different force majeure provisions. There having been no good reason offered to justify the difference, we should mitigate the potential for controversy and litigation by applying to the QPAP the SGAT's provision, which has been established to be suitable. See the *Exclusions (Section 13.3)* section of this report.

Timing of Force Majeure Event Notices
It should not be possible for Qwest to defer force majeure event declarations until after it knows whether it is in jeopardy of meeting monthly performance standards. It should be required to provide CLECs with notice of such events within 72 hours of the time that they occur or that it could first have been reasonably expected to learn of them. Such a provision will allow CLECs timely notice of the need to validate such declarations while events are fresh. It will also preclude reconstructions of past events to identify performance-excusing conditions. See the *Exclusions (Section 13.3)* section of this report.

Impact of Force Majeure Events on Interval Measures
AT&T proposed changes to the force majeure language, in order to assure that the performance excuse is appropriately limited to the time during which such an event disrupted performance. That language should be included in the QPAP in order to assure that Qwest's performance excuse is limited. See the *Exclusions (Section 13.3)* section of this report.

Applying Force Majeure Provisions to Parity Measures
It is arbitrary for the QPAP to provide that force majeure events be permitted to excuse performance under measures where parity between wholesale and retail services is the standard. The QPAP should not include force majeure events among the excuses for meeting parity measures, because such a provision gives Qwest a highly unbalanced right

to excuse substandard performance. See the *Exclusions (Section 13.3)* Section of this report.

CLEC Failures to Forecast as a Qwest Performance Excuse
The Utah rules identify those CLEC forecasts that are necessary and appropriate for Qwest to require in order for it to be able to provide adequate service. It would not be sound to excuse Qwest performance for failure to provide any other type of forecast. The QPAP should be changed to limit performance excuses to failures by CLECs to provide forecasts as required by the Utah rules or interconnection agreement under which they interact with Qwest. See the *Exclusions (Section 13.3)* section of this report.

Tier 2 Payment Use
It is neither necessary nor appropriate to impose a QPAP limit on the use of Tier 2 payments. The QPAP should be changed to ease the use restrictions. See the *Tier 2 Payment Use* section of this report.

Funding Commission Qwest/CLEC Oversight Activities
It may be beneficial for Qwest, CLECs, and the state commissions to adopt and operate under a common system for administering responsibilities and resolving disputes involving wholesale service. Experience with arbitrations, UNE price dockets, SGATs, 271 reviews, as well as the likelihood of substantial disputes in the future indicates that it will take significant state resources to fulfill commission responsibilities. The Congress and the FCC expect states to carry out much of the regulatory and administrative responsibility under the federal act, but have not funded those activities.

It is appropriate to make a portion of Tier 2 escalated payments available for supporting administration and dispute resolution activities. One third of Tier 2 payments and one-fifth of Tier 1 payments could be made to a special fund for these purposes. See the *Tier 2 Payment Use* section of this report.

Three-Month Trigger for Tier 2 Payments
The QPAP does not provide for Tier 2 payments to begin for any measure unless Qwest has failed to meet it for three consecutive months. This standard allows Qwest to avoid payment by performing in only one month of every three, thereby setting a loose a standard of performance. Some Tier 2 measures have Tier 1 counterparts, which also create payment risk for Qwest. For those that do not, Qwest's Tier 2 payment responsibility should begin in the same manner as the Tier 1 payments. For those Tier 2 measures already subject to Tier 1 payments, the trigger should be the second month of non-performance. See the *Three-Month Trigger for Tier 2 Payments* section of this report.

Changing the Weights of Some QPAP Measures
The QPAP provides for three classes of measures; the higher the weight class the higher the payment required in the event of non-performance. CLECs requested that a number of measure weights be increased, because they considered those measures to relate to services that had relatively higher value than was reflected by the QPAP's assigned weight class. Qwest agreed, but argued for compensating reductions in other weights, in order to keep payments in proportion to the value of services, as measured by the prices charged for them.

The CLECs did not express approval of Qwest's rebalanced weights; they argued instead for acceptance of higher weights without reducing any others. We found that approach to be unbalanced and inappropriate. Qwest made a change to address CLEC concerns; CLECs said that the change did not meet those concerns and at least one CLEC said that the change actually moved in the wrong direction entirely. Therefore, the weights Qwest agreed to change should return to the weights proposed in the QPAP filed originally in these workshops. See the *Changing Measure Weights* section of this report.

Collocation

Qwest agreed to a changed collocation proposal, which it said was based upon the approach adopted in Michigan. Qwest should include the appropriate language in the QPAP. See the *Collocation* section of this report.

Rounding Problems with Small Order Volumes

If a standard is 90% and order volumes are five, then Qwest must perform without flaw to meet the monthly standard. Qwest would solve the problem by in effect allowing "one-miss" per month performance to be considered as compliant. This approach unduly disadvantages CLECs with small volumes. Qwest could perform under standard in every month of the year without making payments. The QPAP should be changed to adopt a much more balanced process. Qwest should calculate the yearly rolling average performance. In any month where that average was less than the standard, payments should begin with the first miss. Moreover, from that month forward, escalation should apply in each successive month where the standard is not met through strict application of the monthly formula (e.g., if in the next month Qwest misses 1 out of 8 opportunities on a 90% measure, escalation should apply). See the *Low Volume CLECs* section of this report.

Limits on QPAP Amendments

In order to give Qwest a reasonable degree of certainty about the exposures to which it will be subjected, the QPAP in general constrains appropriately the ability to amend it. However, the limits go further than is necessary to accomplish this objective, with the result that the QPAP is at undue risk of becoming nonfunctional in a marketplace that may be expected to remain dynamic. It requires amendment in several ways to accommodate change without disturbing the overall level of certainty Qwest rightfully expects under the circumstances. The QPAP should: (a) apply normal SGAT dispute resolution procedures to disagreements over the proposed addition of new measures to the QPAP payment structure, (b) support a Tier 2 payment funded (backed up if necessary by a small, capped portion of Tier 1 escalated payments), multi-state dispute resolution and administrative structure, and (c) provide for biennial reviews that will provide an assessment of the QPAP's continuing effectiveness. See the *6-Month Plan Review Limitations* section of this report.

Minimum Payments

Substandard Qwest performance can have particularly harsh consequences for small CLECs. The QPAP should assure that the yearly amount it pays to CLECs with small annual order volumes is sufficient to address this problem. The QPAP should be amended to include an annual minimum payment calculation. Qwest should multiply the amount of $2,000 by the number of months in the year that it failed to meet one or more Tier 1 performance measures for CLECs with annual order volumes of less than 1,200.

Qwest should then subtract from this amount all payments made or to be made to the CLEC for the same year. Qwest should then make up any shortfall between the minimum payment calculation and those actual payments. See the *Minimum Payments* section of this report.

Dispute Resolution
Qwest offered a QPAP amendment that would make SGAT dispute resolution procedures available only for selected QPAP sections. This proposal left unanswered how other disputes about the SGAT should be resolved. Some mechanism covering those other sections is necessary; there is no reason to question the adequacy of the SGAT's general dispute resolution procedures for addressing all disputes about how the QPAP should be interpreted. The QPAP should be changed to make the SGAT dispute resolution procedures applicable to all disputes regarding interpretation and application of the QPAP. See the *Dispute Resolution* section of this report.

Assuring Continuing Data Accuracy
The QPAP needs to be changed to provide for a more structured process for making changes to performance measurement calculation methods more transparent and for planning and conducting tests and examinations (collectively referred to as "audits" by the participants) to assure continuing data accuracy. The program for meeting these needs should be planned and implemented by the state commissions acting in concert, with the assistance of such outside auditing and other expertise as they determine appropriate and which they select after consultation with all interested parties. Portions of the Tier 2 payments, backstopped, if necessary, by a capped portion of Tier 1 payment escalation amounts, should fund that program. See the *Audit Program* section of this report.

PUC Access to CLEC Data
Public service commissions should not be required to undertake cumbersome, time-consuming processes for asking CLECs to provide such data about their service as Qwest already maintains. However, the QPAP should be changed to assure that Qwest supports the preservation of the confidentiality of such data by providing it only upon commission order and only after initiating the procedures necessary to maintain confidentiality. See the *PUC Access to CLEC Data* section of this report.

Retention Period for CLEC Data
The QPAP should adopt specific provisions that will obligate Qwest to retain CLEC data for specific periods and in certain forms. There should also be a provision allowing recalculation of QPAP payments for three years. See the *Providing CLECs Their Raw Data* section of this report.

Late Reports
The QPAP fails to provide a payment for incomplete reports. An incomplete report is the same as a late report for the excluded measures; therefore, the QPAP should be changed to provide a payment for reports that are not complete. Also, the QPAP late report payments adequately address very short delays, but should be changed to provide for

escalation in the case of more significant delays. See the *Late Reports* section of this report.

Payment of Interest
The QPAP does not provide for interest on delayed payments. Qwest agreed to an interest factor, but would set it at the one-year U. S. Treasury rate. The parties to this agreement cannot borrow at that rate; the Commission set a cost of money in the last US West rate case, the staff recommends that rate be used to calculate all interest payments required under the revised QPAP. See the *Payment of Interest* section of this report.

Performance Reports Pending 271 Approval
We recommended against making the QPAP effective prior to 271 FCC application date. However, we believe that there should be an obligation to provide for the immediate initiation of monthly reports of what payment obligations would have been as of the revised QPAP were in operation starting October 1, 2001. See the *Initial Effective Date* section of this report.

Incorporating the QPAP into SGAT and Interconnection Agreements
For the sake of clarity, Qwest's 10-day comments to this report should address in more detail how the QPAP will be incorporated into the SGAT, and should specify the SGAT sections that would accompany QPAP election for incorporation into an existing interconnection agreement. See the *QPAP Inclusion in the SGAT and Interconnection Agreements* section of this report.

Billing Credit Format
Qwest presented a sample billing credit format at the workshops in order to demonstrate that CLECs would be able to identify the sources of credits given. The QPAP should require Qwest to provide credit information in substantially the form of that sample, absent commission consent to change it. See the *Form of Payments to CLECs* section of this report.

Uncontested Qwest Changes to the QPAP
Qwest made several QPAP changes, which it said were initiated by FCC concerns. No participant objected to them; they should be incorporated. See the *Qwest's Response to FCC-Initiated Changes* section of this report.

State Commission Powers
No party raised the issue; however, we were concerned that the QPAP says that state commissions may recommend to the FCC that Qwest be prohibited from taking on new in-region long distance customers in the event that the cap is reached. Because commissions can already do so without allowance from the QPAP and because this specification of a limited power may be read as constraining commission options otherwise available under law, this provision should be eliminated. See the *Specification of Commission Powers* section of this report.

IV. Meaningful and Significant Incentive

A. Total Payment Liability

1. The 36% Upped to 44% Net Revenues Standard

Qwest has proposed to place at risk each year a total of $306 million, which represents 36% of Qwest's 1999 ARMIS return for local services in the nine states combined. The ARMIS return is measured as total operating revenue less operating expenses and operating taxes. Qwest agreed to remove from this total a downward adjustment for "Commission Rate Orders." The effect of this change is to increase in several states the amount at risk, as compared with what would have been the case without such an adjustment.

Even though the New York Public Service Commission has found it necessary to raise the amount at risk in that state to 44% after having initially placed the incentive factor at 36%, Qwest has continued to argue that the FCC has found this 36% measure of net revenue a "meaningful incentive" to maintain adequate performance in 271 orders in New York, Texas, Kansas, and Oklahoma.[11] The 36 percent factor represents $306 million for the nine states, which compares to the following amounts already approved:[12]

Table 1: Total Amounts at Risk in Other BOC PAPs

State	Kansas	Massachusetts	New York	Oklahoma	Texas
Amount	$45 million	$155 million	$269 million	$44 million	$289 million

Qwest cited the Colorado Special Master's Report addressing Qwest's performance assurance plan in that state as supporting a similar cap of 36% of 1999 Colorado ARMIS net return.[13] The plan discussed in that report uses a somewhat different structure, as compared with the QPAP being considered here. Both have three segments, but they are described differently. The following table shows a simplified comparison of the two plans.

Table 2: Comparison of QPAP and Colorado Special Master's Report Payments

PLAN	QPAP	Colorado
Base Payments to CLECs	Tier 1	Tier 1.X
Escalated Payments to CLECs	Included in Tier 1	Tier 1.Y
Payments to States	Tier 2	Tier II

[11] Qwest Initial PAP Brief at page3.
[12] Qwest Initial PAP Brief at page 11.
[13] Qwest Initial PAP Brief at page 12, citing section III.D. of the report.

Both Qwest and many of the participating CLECs made liberal reference to the Colorado Special Master's Report; each claimed that it supported their positions on the question of caps on total payments. The Colorado report describes Tier 1.X payments as providing compensatory payments to CLECs, and as being designed to make them whole. The Colorado report analogized them to liquidated damages. That report, which was issued during the first half of this year, recommended that parties claiming damages to be different from the rough approximations adopted in the report make submissions documenting the kinds of payments and amounts that would better reflect actual harm. Interestingly, despite this report's invitation and the passage of significant time between its issuance and the hearings in these workshops, no such submissions have been made.[14] However, the Utah staff believes that the raising of the cap to 44% after the failure of an initial 36% cap in New York to provide adequate BOC incentive speaks for itself.

The Colorado Special Master's Report described its Tier 1.Y payments as creating an incentive for Qwest, by escalating payments in cases where deficient performance continued for successive months. The Colorado report would provide for payment of only a portion of the Tier 1.Y payments to CLECs, recognizing that this payment segment, while it may serve in part to compensate CLECs for additional harm, is also intended to deter inadequate performance. It serves this latter purpose by imposing on Qwest payment obligations that exceed the amount of harm caused to CLECs. The Colorado Special Master's Report then described Tier II payments, which were designed to require Qwest payments for failing to meet standards that were either aggregate (i.e., not CLEC-specific) in nature, or that related more to general support of competition as a whole. The report recommended the following monthly payment cap calculation method:

- Determine the amount equal to $1/12^{th}$ of the annual cap, which becomes the monthly cap
- Apply all Tier 1.X amounts against the monthly amount, but pay them even if they exceed that amount
- Pay Tier I.Y and II payments to the extent that the monthly cap was not exceeded by Tier 1.X payments
- Carry forward any unpaid Tier 1.Y and II payments until they can be paid from monthly amounts remaining after payment of Tier 1.X amounts.
- Allow the public service commission to increase the annual cap (and therefore the monthly amounts derived thereunder) in the event that Qwest should reach the cap for two consecutive years or owe $1/3^{rd}$ of the cap at the end of each of two consecutive months.

ELI/Time Warner/XO Utah argued against the QPAP's adoption of the 36% cap, citing several grounds, which included:[15]

[14] Final Report and Recommendation by the Special Master *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T (Colorado Special Master's Report), provided as Exhibit S9-WCM-CEW-3. See pages 12 through 16 for a discussion of the structure of the payments proposed in that report.

[15] ELI/Time Warner/XO Utah Initial PAP Brief at page 12.

- That this figure was not comparable to the caps in the PAPs of other BOCS, because the QPAP is much more favorable to Qwest in other respects
- That the 36% figure is less than Qwest's profits from intrastate service in Washington and Utah, which would allow Qwest to continue profiting from local exchange service even after making payments at the cap.

ELI/Time Warner/XO Utah said that a small market share in the in-region, InterLATA market (i.e., less even than the 25% that Verizon initially captured in New York), would justify surrendering 36% of its other net revenues to protect its local exchange market from competition.[16]

AT&T argued that Qwest's reliance upon the FCC's acceptance of the 36% total payout in other proceedings was misplaced. AT&T said that Qwest's commitment to the 36% amount was undercut by many other self-serving changes Qwest had made in other material provisions of the plans accepted in those proceedings, citing specifically the following QPAP provisions:[17]

- Broad offset provisions
- Broad exclusion provisions
- Limits on use of dispute resolution procedures
- Tier 2 payment limitations
- Lower late report payments
- Six-month PAP review limitations
- Narrow audit provisions

Discussion: The FCC seems to consider that 36% of net interstate revenues is sufficient to provide an adequate incentive in some contexts. The Colorado Special Master's Report, issued after the input of many of the same CLECs participating here, applied that same basic standard to the Qwest region. Qwest presented evidence to support the economic significance of a sum based on that calculation. The participating CLECs had full opportunity to present evidence that would show that the particular facts about Qwest or their own services already being taken and to be taken from Qwest raise considerations or concerns not already addressed by the FCC in those other cases. Instead, we heard only more general objections to the use of a 36% standard.

Were we the first to consider this issue, such general objections might have carried more weight. Qwest correctly noted a central gap in what a number of participants argued on the question of the adequacy of the 36% cap. While criticizing the sufficiency of the payments provided by QPAP, they failed to answer the fundamental question raised by such an attack, i.e., how much would be sufficient.[18]

We are cognizant of the provident caution sounded by AT&T and ELI/Time Warner/XO Utah; i.e., that we not look in isolation at this standard. The FCC certainly had in mind

[16] ELI/Time Warner/XO Utah Initial PAP Brief at page 7.
[17] AT&T Reply PAP Brief at page 7.
[18] Qwest Reply PAP Brief at page 11.

the entire contents of the PAPs before it when deciding whether the 36% standard was sufficient to create a meaningful and significant incentive to other BOCs asking for the same relief as Qwest seeks here. Our conclusion, however, is based on the information coming from New York where the 44% updated cap was found necessary after having found a lesser cap inadequate. The conclusion we reach here is that we can and should learn from the efforts and recalculations of other state commissions, especially that of New York, and find that the 36% cap may not be an appropriate starting point. We also recommend that any cap set may be reexamined by the Utah Public Service Commission as can all of the other QPAP provisions affecting Qwest's incentive to perform.

2. Procedural Caps

AT&T and Z-Tel supported the adoption of a procedural rather than an absolute or "hard" cap.[19] WorldCom supported this approach, citing that a procedural cap makes it more difficult, as compared with a hard cap, for Qwest to make a calculating decision whether it is more economical to continue bearing the costs of non-compliance, rather than to bring its performance up to standard. WorldCom also observed that a procedural cap would give state regulators the power to modify the plan where circumstances would warrant a change.[20] AT&T also argued that a hard cap would operate to deny a CLEC full compensation in cases where the cap was reached before an individual CLEC suffered substandard performance. For example, under the QPAP, if Qwest reached the cap in October, but in that same month first failed to meet standards in the case of CLEC "X", CLEC X would be entitled to no payments at all.[21]

Discussion: There was an overabundance of ultimately unimportant urgings about whether this QPAP is voluntary or not. Whatever its nature, the issue before us is not changed. That issue is whether the participating commissions should tell the FCC that they think the QPAP sufficient to satisfy the public interest. Despite the confusion engendered by that debate, however, one cornerstone conclusion is extremely clear: Qwest offers it as the toll it is willing to pay to cross the bridge to in-region, InterLATA competition. Just as CLECs have the opportunity to decide whether the costs of entering the local exchange market are too great, so should Qwest have a similar ability before exercising its end of the Telecommunications Act of 1996 "bargain." The FCC and the states have gone a long way to providing a reasonable degree of economic assurance (as far as any business in an essentially free economy has a right to ask) about the costs of using incumbent facilities to enter that market.

Providing that assurance in reasonable measure is proper, because the Congress, as events have shown us, has asked CLECs to take large financial, operating, and customer-perception risks if they want to compete with the BOCs who are entrenched in their individual local exchange markets. There should be a compensating kind of certainty for the BOCs as they face similar business decisions about the markets of other carriers. A procedural cap that leaves others free to escalate without limit the risk that Qwest must take in entering the in-region InterLATA market makes a decision to enter the market much more speculative than it need or should be.

[19] AT&T Initial PAP Brief at page 19; Z-Tel Initial PAP Brief at page 19.
[20] WorldCom Initial PAP Brief at page 8.
[21] AT&T Initial PAP Brief at page 20.

Our concern in this regard does not arise from the fact that the "others" who will make such escalation decisions are public service commissions; our faith in their ability to make such decisions carefully and wisely does not underlie this conclusion. However, the concerns of those who make the decisions, which include not only Qwest, but those who provide the company with capital, must also be taken into account. We should ask three questions and we must rely upon the answers to all in order to decide this issue:

- How much would we undercut the purposes and goals of the QPAP by failing to incorporate the economic "opener" that a procedural cap represents
- How likely will it be that CLECs will be under-compensated or that Qwest will be making a calculated decision to under-perform, should the caps be reached
- How much should we concern ourselves that a decision not to enter the in-region, interLATA market may follow.

The answer to the first question is that there will be no material weakening of the QPAP, given the other methods and processes available to redress an inability of Qwest to stay below the cap. These things include root-cause analyses, other enforcement proceedings, and the ability to revisit InterLATA authority itself. In light of that last power, we see the particular value of caps at all as assuring that: (a) Qwest not benefit from the delay it would take to exercise that power, and (b) that there be no reward in walking just this side of the line at which the exercise of that power becomes a real risk. A cap high enough to provide assurances in those two regards should be sufficient.

The answer to the second question is that there is not a basis in the record before us to conclude that a failure to properly control performance is at the root of continuing, high PAP payments. The analysis underlying this conclusion is set forth under the subject of *Limiting Escalation to Six Months*, which is addressed later in this report.

The answer to the third question is that the risk, while perhaps not "clear and present," is not immaterial. The FCC has made it clear that validly authorized in-region, interLATA market entry serves the public interest. Our own view is that the public benefits of true competition in the local exchange market are disproportionately much greater, but that relative disparity does not render unimportant the goal of increasing competition in other markets.

However, the above conclusions relate to the existence of a cap in general, not to a specific level. So while the finds are of use in evaluating the necessity of a cap in general, they provide little or no help in evaluating the proper level of the cap in particular.

Too much reliance has been placed on the Colorado Special Master's Report as supporting a procedural cap. It does unarguably provide for one, but it proposes very difficult standards for triggering a review. It requires one of two conditions to be met:

- Exceeding the annual cap for two years running
- Producing payments for two consecutive months at amounts that, when annualized, equate to twice or four times the annual cap amount.[22]

[22] The language of page 17 of that report may suggest that the annualized amount be equal to twice the annual cap amount, or perhaps even some other amount; in any case, the transitory nature of observations

Should the cap be exceeded for two years running, other provisions and mechanisms should already have come into play to address and respond to the underlying problems. As to the two-month trigger, it would take results that, while producing substantial penalties in their own right, could well even out across the remaining 12 months of the year. Therefore, the Colorado report offers little guidance to this analysis.

More intriguing is the WorldCom proposal to set as a procedural cap the 44% of net local revenue established by the New York Public Service Commission in post-271 proceedings to address the now well-known problems that arose after Verizon (Bell Atlantic-New York) received 271 approval from the FCC.[23] The New York Commission raised the level to 44% in response to problems observed, after 271 approval. We can perhaps learn from the miscalculations of New York, which is now further along in the 271 process concerning backsliding, and take note that the 36% cap initially set by the New York Commission is no longer to be considered reasonable. We find that the incorporating of a 44% cap has significant merit. The escalated cap would apply only if Qwest had miserable failures for many repeated measurements periods and significant volumes of failure. If Qwest provides the expected service, the escalated cap (or even the 36% cap currently proposed by Qwest) would never apply and would only be of theoretical interest. As noted in the general QPAP design below, we recommend an escalated final cap of 48% (see cap movement principle below).

The WorldCom proposal is, while not offered in that form by WorldCom, a targeted and measured increase, as opposed to the unlimited one generally proposed by CLECs here. Such an increase would moderate the uncertainty, discussed below, that an unlimited re-opener would place upon Qwest. Signaling the amount of an increase in exposure, accompanied by clear and complete statement of the conditions that cause it can better serve to provide appropriate incentives without making business entry decisions unduly speculative.

Because we have yet to accumulate substantial experience under a broad range of PAPs across the country, we consider it prudent to consider the possibility of allowing movement of the cap within a reasonably confined range and for a defined set of circumstances. Coming experience will tell us much more about whether a 36% cap or a 44% cap is or is not appropriate; but if we err, we choose to err on the side of caution. Take just four of what are probably numerous examples of how our knowledge will increase in the next several years:

- Qwest performance baselines will become more established
- Root cause analyses will identify the actual causes of persistent, substandard performance
- What needs to be measured and how those measurements should be used will be enriched by growing competition
- The trend in local market penetration by CLECs will tell us whether 1999 remains an appropriate year to use as the foundation for setting total financial exposure.

about amounts determined for 12-month periods that can be drawn across 1/6th of such periods still applies, as is discussed immediately below.

[23] WorldCom Initial PAP Brief at page 8.

We believe that the combination of factors such as these could support upward movement of the 44% limit. Therefore, we recommend the inclusion of the following Cap Movement Principles in the QPAP:

A maximum increase in the cap of up to 4 percentage points shall occur upon order by the state commission that it is appropriate to do so in cases where the current cap has been exceeded for any consecutive period of 12 months, provided that:

> *a. the commission shall determine that Qwest could have remained beneath the cap through reasonable and prudent efforts, and*
>
> *b. the commission shall have made that determination after*
>
> *1. having available to it on the record the results of root cause analyses, and*
>
> *2. providing an opportunity for Qwest to be heard.*

Without such a proposal as shown above, in years where the cap may be exceeded, the QPAP could otherwise operate severely and unfairly against CLECs who suffer disproportionately from Qwest under performance late in the year. This result is completely arbitrary and it could have devastating consequences for a CLEC that has given up its other rights to compensation in return for electing the QPAP provisions. There is a compelling public interest in assuring that compensation does not become a matter of one's place in the line – a position, by the way, that is not determined by the CLEC but by the performance that Qwest delivers. Therefore, when the monthly cap is reached, each CLEC that would normally be due a Tier 1 payment shall receive a promise of payment (debt) from Qwest that shall accumulate interest until such time as Qwest pays it. Likewise, the State of Utah shall also receive a promise of payment for any Tier 2 payments that would normally be due it. These debt instruments will also bear interest. At the beginning of any payment period (monthly), Qwest shall repay as much outstanding debt as the monthly cap allows before applying payments to current penalties. Qwest may at its discretion pay amounts in excess of the monthly cap to avoid interest charges.

Given that this proposal addresses the issues raised against a completely open-ended cap, and given that the proposal addresses the concern that any hard cap rewards bad behavior, we recommend that the essence of this proposal be adopted.

3. Qwest's Marginal Cost of Compliance

A number of participants supported the argument of the New Mexico Advocacy Staff that one sound way to examine the propriety of a firm payment cap would be to compare: (a) Qwest's marginal cost of complying with the performance standards against (b) the payments to which it would be exposed for not complying. As the New Mexico Staff's brief put it:[24]

[24] New Mexico Advocacy Staff Initial PAP Brief at page 15.

> *A cap such as the annual cap proposed by Qwest permits Qwest to calculate the net cost of discriminatory service to CLECs and weigh that cost against potential gains to Qwest of poor service to competitors.*

Z-Tel said that there is a "substantial risk" that Qwest will decide that paying 36% of its 1999 measured revenues is preferable to keeping its local market open.[25]

Qwest argued that there is no evidence to show that its marginal cost of compliance is greater than 36% of its net revenues. Moreover, Qwest said that the FCC has rejected the notion that such a balancing is appropriate in the first place. Qwest added that, even were it appropriate to use as a benchmark, the calculation of marginal cost is not straightforward, because Qwest would face enforcement risks beyond the monetary payments imposed under the PAP, were it to reach maximum payment levels.[26] Qwest also argued that any such analysis would have to consider not just a single year's payments. The reasoning was that Qwest would have an incentive to make very high cost investments that would produce benefits for numerous years, because those investments would reduce recurring QPAP payments in every year that the investment (e.g., additional trucks or network facilities) yielded benefits. In other words, in terms of examining Qwest's incentives, it would be necessary to look not only at one year's payback (e.g., reduced QPAP payments), but rather to value the stream of annual reductions that would result from an investment.

Discussion: There is certainly theoretical appeal in the marginal cost analysis that the New Mexico Advocacy Staff's witness explained. However, there are a number of insurmountable problems in applying it:

- As its proponent stated, neither he, Qwest, nor any other party presented evidence of what Qwest's marginal costs of compliance were, thus making the equation he espoused impossible to perform from this record, and perhaps at all
- Were there such evidence, there would remain the need, again as the witness agreed, to add to the calculation the expected values of other risks faced by Qwest, such as revocation of section 271 approval, or parallel enforcement proceedings
- Long-term investments by Qwest would reduce payments for a number of years; therefore, the necessary equation could not be performed by a simple comparison of a single year's costs and reduced QPAP payments.

Thus, while the proffered equation had theoretical appeal, it was ultimately not a solution here, because there was no evidence to enable its use. Moreover, it is unlikely that an attempt to gather evidence and to use it in an analytical model would yield particularly reliable results anyway, given the subjective nature of the other applicable risks and the judgments that would be necessary to value on a present basis the multi-year benefits that long-term investments would yield. We believe that the New Mexico Advocacy Staff witness's thoughtful and candid testimony recognized these unfortunate limitations.

[25] Z-Tel Reply PAP Brief at page 11.
[26] Qwest Initial PAP Brief at page14.

4. Continuing Propriety of a Cap Based on 1999 Net Revenues

ELI/Time Warner/XO Utah also criticized the freezing of the cap amounts that would result from continuing to use 1999 net revenues into the future.[27]

Discussion: This argument appears to rest upon the implicit premise that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business. This premise is quite speculative. All other things being equal, the effects of access line growth would have to exceed those that result from loss of market share to CLECs. Moreover, it is not at all clear that all other things will remain equal. Many examples demonstrate the uncertainty:

- Local-exchange business retention strategies may produce broadly-based price concessions that lower per-access line net revenues
- If there is cross-subsidization in certain elements of local-exchange service, current tariff prices that contain a premium above costs may not remain sustainable as competition increases[28]
- Financial, accounting, and operational restructuring of interstate versus intrastate services, which are by no means unlikely in the fluid marketplace and regulatory environments now existing, may alter materially how intrastate return is calculated and how much it ends up being in the future.

There are probably a number of additional examples. These, however, are sufficient to demonstrate that there is no reason to conclude that the ongoing use of 1999 net intrastate revenues is more likely to increase or decrease Qwest's net financial exposure. On the whole, it appears preferable to rely upon the firm dollar amounts that the QPAP provides for, as opposed to taking a ratcheting risk of unknown direction and unknowable magnitude.

5. Likely Payments in Low Volume States

The New Mexico Advocacy Staff questioned the importance to be placed on the total cap amount in its state – arguing that very low CLEC local-exchange-service business volumes would make it impossible to generate payments at or near the New Mexico limit.[29] Qwest responded that its burden is not to produce CLEC business volume, but to respond to the orders that it receives. [30]

Discussion: The New Mexico Advocacy Staff argument, assuming its underlying factual basis to be sound, does not bear directly on the sufficiency of the cap. If low CLEC order volumes comprise the reason that the cap would not be reached, then a higher hard cap or a procedural cap would be unresponsive. Those higher triggers would not be met either. In the circumstances postulated, the issues become whether the PAP will: (a) adequately compensate CLECs with low order volumes, and (b) induce Qwest not to provide

[27] ELI/Time Warner/XO Utah Reply PAP Brief at page 7.
[28] While similar to the first example, this one distinguishes itself by its application to a specific and narrower range of services that may be affected particularly because of historical regulatory pricing decisions.
[29] New Mexico Advocacy Staff Initial PAP Brief at page 25.
[30] Qwest Reply PAP Brief at page 15.

substandard service in a state with low overall order volumes. The QPAP does contain a provision for minimum payments, which will be discussed below. Such a provision is the direct way to address the New Mexico Advocacy Staff concern about how low order volumes might dilute the compensatory and incentive goals of the QPAP.

6. Deductibility of Payments

WorldCom questioned whether we should find comfort in the cap's adequacy in light of the fact that Qwest may be able to deduct payments for income tax purposes.[31] Qwest noted that the likely consequence of adopting WorldCom's suggestion, i.e., to declare the payments penalties in order to make them non-deductible by Qwest, would be that the CLECs receiving them would not have to declare them as income.[32]

Discussion: It should probably come as no surprise that parties who have described much of their opponents' positions as bald-face attempts to move payments in a self-serving direction, should bring the Internal Revenue Service into the argument. However, we consider it safe to presume that the prior plans considered by the FCC were also conceived in the shadow of our ever-watchful federal government revenuers. We see no reason unique to Qwest that would justify a tax-netting factor here. Neither, by the way, do we see any reason why the nomenclature of the QPAP, as opposed to the substance of the payments contemplated, would put the hounds off the scent in any case. We have confidence that what the thing is, as opposed to what those interested in the result call it, is the more material fact bearing on the question of taxability. Either way, it is our intent that Qwest should not be advantaged in their paying of penalties as a result of poor performance and then balancing the effect through tax write-offs, in that the incentive for Qwest to avoid these penalties would be significantly reduced.

B. Magnitude of QPAP Payout Levels

Total economic exposure addresses only part of the broader issue of the sufficiency of payments under the QPAP to provide a meaningful and significant incentive to Qwest. Equally material is the question of what level of event-specific payments apply. A total exposure of even much more that 44% of net intrastate revenues might not deter substandard performance, if payments per event of non-compliance are so low that:

- They do not compensate CLECs, as a baseline consideration, for the harm that poor performance causes them
- Their accumulation is at so slow a rate as to make it improbable that they will rise to economically significant levels, no matter how bad performance becomes
- They fail to communicate to Qwest that compliance is preferable to defiance.

Qwest presented an analysis of the payments that the QPAP would have produced for the months of February through May 2001, on the basis of the assumption that the QPAP had been in effect for at least six months prior to that February. The calculations to which Qwest testified showed that payments would have been ***CONFIDENTIAL*** and would

[31] WorldCom Initial PAP Brief at page 4.
[32] Qwest Reply PAP Brief at page 27.

have produced the equivalent of ***CONFIDENTIAL*** free years of service for CLECs. Qwest considered these payment levels to be very substantial in light of the fact that Qwest measured its overall performance level under the applicable performance measures at 92% during this period. A principal premise underlying Qwest's belief in the utility of this analysis is that the prices that CLECs pay reflect a relevant measure of the value of the services that they receive for paying those prices. This premise takes the view that the price of goods or services in a free economy is a persuasive measure of their value.[33]

Qwest also presented analyses of the combined Tier 1 and Tier 2 payments it would have made for the 2001 months of February through May for unbundled loops and coordinated cuts. Qwest's analysis showed that its QPAP payments for those measures would have exceeded the total revenue it would have received for the services measured by them. [34]

Qwest addressed as well the "significance" of payments for individual occurrences where it failed to meet the standards for which the QPAP requires payment. Qwest said that the individual payments were significant in their own right, but it was also necessary to recognize that the same order or activity could produce multiple payments.[35] Thus, even if there were concern that the payments set for an individual measure were insufficient to compensate CLECs for damages, Qwest felt that the QPAP's provision of multiple payment opportunities for the same activity or closely related activities would assuage it.

CLECs broadly attacked this analysis, asserting, for example that:

- AT&T was among the CLECs who said that the fact Qwest would still have been paying substantial amounts even after escalation of payments for six-months (see the discussion of payment escalation under the subject *Limiting Escalation to Six Months* below) shows the inadequacy of the payment structure[36]

- ATT testified to a calculation that there was only a one in 96 billion chance that Qwest's claimed 10 separate payments would occur for a single activity or set of related activities[37]

- AT&T also argued that the Qwest analysis of sample payouts for the February-March 2001 period should have assumed that the QPAP began in February, which would have eliminated the accelerated payments and reduced the sample payouts by over 60%

- Qwest escalated payment amounts for misses for more than six months, but the QPAP limits escalation in payments to only six consecutive months[38]

[33] Qwest Initial PAP Brief at pages 7 and 8.
[34] Qwest Initial PAP Brief at page 9.
[35] Exhibit S9-QWE-CTI-5, page 6.
[36] AT&T Initial PAP Brief at page 23.
[37] AT&T Initial PAP Brief at page23; WorldCom Initial PAP Brief at page 6, citing the fact that Qwest's purported combination of payments was "statistically unlikely;" Covad Initial PAP Brief at page 16, terming the maximum $750 payment cited by Qwest as difficult to get.
[38] Covad Initial PAP Brief at page 11.

- The total payment amounts shown by Qwest were paltry when compared with its third-quarter projected total revenue[39]

The New Mexico Advocacy Staff said, as was addressed above under the discussion of *The 36% of Net Revenues Standard*, that the proper inquiry was not the size of the payments provided to CLECs, but Qwest's marginal costs of not complying with the standards, which the staff's testimony presented as the alternative course of action that the QPAP should seek to discourage.[40]

Qwest responded that the calculations showed the effects of full implementation, and therefore did account for escalation properly.[41] Qwest also argued that no CLEC had presented any evidence to show that the sample payout levels testified to by Qwest failed to fully compensate CLECs for their damages.[42] Qwest also said that CLECs did not support a more direct assessment of their losses; they declined to provide to Qwest information that would have allowed such an exercise.[43]

AT&T responded to the claim that there was no CLEC evidence of damages. An AT&T brief contained an extensive list of qualitative factual assertions about areas of damage. The brief did not cite to the portions of the transcript where evidence in support of those assertions could be found.[44]

Discussion: The arguments made against the relevance or the accuracy of Qwest's calculations were inapplicable or incorrect. First, the argument that the Qwest payout calculations show the ineffectiveness of the QPAP as a motivator of compliant performance is illogical. The presumed payments were, of course, not actually made. They were modeled for an historical period of time during which payments were not required. Not having been payable or paid, they obviously could not have motivated performance as they might have had they been payable.

Second, AT&T's statistical calculation of the probability of multiple payments from single or related activities was flawed, because it failed to recognize a central aspect of Qwest's argument, which was that the variables affecting payment levels are not independent; i.e., the same failing that causes one measure to be missed can cause another to be missed. AT&T's strict multiplication of probabilities can only be applied to

[39] Covad Initial PAP Brief at page 12.
[40] AT&T Initial PAP Brief at page 22.
[41] Qwest Reply PAP Brief at page 7.
[42] Qwest Reply PAP Brief at page 6.
[43] Qwest Reply PAP Brief at page 8.
[44] AT&T Reply PAP Brief at page 4. Footnote 9 of that brief indicated that AT&T was prohibited from exploring additional areas of cost. That statement is disingenuous. First, AT&T was not prohibiting from bringing any evidence into these proceedings in proper order. The objection sustained was to a question that went well beyond the bounds of the rebuttal testimony to which AT&T's witness was responding. By that time AT&T had already passed on two fully unconstrained opportunities to tell us what its additional costs were. It was merely denied an opportunity to go beyond the clear and pre-established bounds of questioning to get into new subjects. Moreover, a review of the transcript indicates that the question sought yet more qualitative, not quantitative, evidence. See the August 29, 2001 transcript, starting at page 51.

independent variables.[45] AT&T's simple exercise could be very far from the mark in this case, where the variables are not all independent. Even if we do not reach the maximum coincidence of payment opportunities from the same or related activities, we can nevertheless accept as established the fact that causally linked payment opportunities and resultant increases in payment levels are proper to assume.

Third, it is curious for AT&T to argue that Qwest's sample calculations should not have assumed that the QPAP had been in existence for at least six months. AT&T, among others, has placed strong emphasis on the need for escalating QPAP payments. It is not consistent to argue that payments need to be escalated to provide a proper inducement, yet to suggest that the effects of that escalation should be ignored when assessing whether payments are sufficient to provide the inducement being sought. The QPAP will start only once; we can presume that it would continue indefinitely in the event of 271 approval. It cannot be true that the best way to assess the operation of an ongoing plan is to examine its inception period, where that inception period will not allow for the full display and impacts of features that will be ongoing.

Fourth, the record does not show that Qwest increased payments beyond the six-months of escalation that is provided for in the QPAP. The evidence shows that the Qwest analysis accounted for escalation, where appropriate, up to and including, but not in excess of six months.

Fifth, how the QPAP payments relate to consolidated Qwest net income does not bear upon the issue addressed in the analysis or the issue before us. There was no proposal for payments that are a function of revenue sources that have nothing to do with local exchange service; moreover, none would be appropriate. The proper base for assessing overall exposure is, as the FCC appears repeatedly to have accepted, intrastate net revenue. Moreover, at the overall level of performance Qwest reached in serving CLECs during the period in question, it is not clear why Covad would suggest that significantly higher payments would have been anticipated. Surely Covad would not argue that payments not be made a function of performance to CLECs, but rather a parent's consolidated income.

Qwest offered the payout information to show that its costs of noncompliance would be substantial under a fully operational and mature QPAP. The evidence was useful, its intent and its characteristics were overtly demonstrated, and its application of memory was appropriate to the use that the sponsor intended.

[45] For example, assume that: (a) it must be cloudy and less than 32 degrees for snow to happen, (b) the random chance of clouds for a given locale is 20 percent, (c) the random chance of temperatures below 32 degrees for a given day is 10 percent, (d) it snows 50 percent of the time that such conditions are met, and (e) we want to know the odds that it will snow on any given day at that locale. If we calculate the odds of snowfall as if these variables were independent, then the chance of snow is 0.2 times 0.1 times 0.5, which equals 1 percent. However, we can note that clouds affect temperature; therefore, there is a greater coincidence between cloudiness and temperature than the previous arithmetic would suggest. Let us suppose that it is more often sunny in the summer in this locale, and that it is in fact cloudy on 75 percent of the days when the temperature is less than 32 degrees. We would now more accurately calculate the odds of snowfall on cloudy days of less than 32 degrees as being six times more likely; the arithmetic follows: 0.75 times 0.1 times 0.5, which equals 6 percent. Obviously, if we are dealing with more than two linked variables among many, the effects of accurately depicting the linkages with arithmetical accuracy would be much more dramatic.

C. Compensation for CLEC Damages

1. Relevance of Compensation as a QPAP Goal

Z-Tel discounted substantially the relevance of the goal of compensating CLECs for damages incurred as a result of non-compliant Qwest wholesale performance. In fact, Z-Tel said that the point of a performance assurance plan is to create incentives to detect and sanction poor wholesale performance, not to compensate CLECs for harm. Apart from the question of whether the QPAP should address CLEC compensation at all, Z-Tel also argued that it is not appropriate to subject such compensation to a liquidated damages test, because Qwest has not shown that the legal standard applicable in deciding the propriety of allowing liquidated damages has not been met here.[46] In support of its position with respect to the insignificance of the question of damages in connection with the QPAP, Z-Tel asserted that the FCC has not yet faced an application that specifically requires CLECs to waive their other contractual claims and other rights of action.[47]

Discussion: Many participants disputed the centrality of actual CLEC harm to the question of determining payment levels to CLECs, but none so strongly as Z-Tel. All of the other participants at least implicitly made the sufficiency of the QPAP to compensate CLECs for harm they suffered a matter of interest to these proceedings. The FCC does couch its test in terms of incentives, but an elementary legal principle in the field of remedies is the public interest in holding contract parties, tort feasors, and other culpable perpetrators of injury responsible for the damages they cause to induce them to behave in ways that will avoid such harm. There certainly exist, in some cases, additional remedies not related directly to harm but designed to provide strong incentives to avoid certain forms of conduct. Punitive damages are one example; the escalation of Tier 1 payments (in part) here and the Tier 2 payments here are others. However, the existence of those added remedies does not signify that the award of compensatory damages at law or equity has no relationship to the inducement of publicly acceptable behavior.

Moreover, even if the case were otherwise, there is sound reason for addressing the recovery of traditional damages together with the inducement features of a QPAP. Quite obviously, if one were to ask how much it takes to cause a BOC to act in manners considered acceptable, it would be incongruous to ignore substantial payments that are reasonably certain to be ordered by other authorities for the same behaviors or activities.

Despite the common sense of the matter, there does remain the question raised by Z-Tel's suggestion that one cannot read prior FCC decisions as embodying the belief that those PAPs going before this one contain a significant CLEC compensatory element. The Michigan Public Service Commission Opinion and Order on the Ameritech Michigan PAP,[48] which the Commission noted was based on the Texas plan, for example, did the following:

- Talked about the plan's "remedies" for "violations" [page 4]
- Called the Tier 1 payments "liquidated damages" [page 5]

[46] Z-Tel Initial PAP Brief at page 27.
[47] Z-Tel Initial PAP Brief at page 33.
[48] Provided as WorldCom Exhibit S9-WCM-CEW-7.

- Responded to CLEC arguments that Tier 1 payments would not "adequately compensate them for the harm they suffer" in some cases [page 5]

The Texas PAP[49] that was part of the 271 application approved by the FCC says the following about damages:

- The BOC will pay CLECs 'liquidated damages" [Section 5.2]
- The parties agree that damages are liquidated because proof of them would be difficult to ascertain and because the provisions of the PAP reasonably approximate contractual damages [Section 6.1]
- The only remedies explicitly preserved for CLECs are "noncontractual" ones [Section 6.1]

Even the joint CLEC performance incentive plan submitted to Qwest recognizes the compensatory nature of material portions of Qwest payments.[50] Page 1 talks about a "system of self-enforcing consequences for discriminatory ILEC performance" and about the inability of CLECs to rely upon the "extensive delays inherent in the adjudication and appeals process." Page 4 talks about the need to minimize litigation and regulatory delays associated with imposing "financial consequences." Page 6 expresses the joint CLEC view that "Tier I provides a form on non-exclusive liquidated damages payable to individual CLECs."

History demonstrates that state public service commissions, the FCC, and other CLECs all recognize the compensatory nature and the liquidated damages elements of performance assurance plans. Z-Tel itself suggested on several occasions that, should certain of its QPAP adjustment proposals be viewed as overcompensating CLECs, the added payments could be transferred to Tier 2. Were the sole purpose of the QPAP unrelated to compensating CLECs or limiting their outside damage recovery opportunities, it is not clear why Z-Tel was proposing that any compensation at all go to CLECs, in whatever tier it be placed. We can be reasonably comfortable that even Z-Tel accepts at some level the CLEC-compensatory nature of the QPAP.

It is appropriate for the QPAP to address the question of compensating CLECs for contractual damages, and it is appropriate that the QPAP liquidate such damages, given the difficulty in measuring them precisely, and given that the QPAP payments approximate such damages. A central feature of this QPAP, like others before it, is its ability to replace costly and protracted litigation and its uncertain results with a system that is more appropriate to creating and maintaining an efficient and balanced commercial relationship. If the intention of the FCC for a PAP were otherwise, we might well wonder just what litigation and uncertainty would be avoided. Nearly all of it would loom under Z-Tel's approach, yet we know avoiding such clouds to be a central purpose of performance assurance plans.

[49] Exhibits S9-ATT-JFF-7 and 8.
[50] Exhibit S9-ATT-JFF-9.

2. Evidence of Harm to CLECs

Covad said that a cap would necessarily leave CLECs less than whole for the harm that they suffer from Qwest conduct. Covad did not present any quantitative evidence that would correlate the harm it suffers either with the amounts it would receive under the QPAP, or with the 36% revenue cap.[51]

WorldCom objected to the CLEC lost-profits analysis presented by Qwest because it was based on a one-line business analog service rate. WorldCom said that Qwest's analysis failed to include the loss of profits that would come to CLECs when other services were bundled or when customers had more than one line. WorldCom also argued that Qwest failed to consider customer acquisition, local-service-request, maintenance and repair, or coordinated-cut costs in its analysis. WorldCom also said that the commissions could consider Qwest's labor rates as surrogates for CLEC costs in assessing damage resulting from poor Qwest performance.[52]

AT&T noted that intangible CLEC losses were "impossible to quantify;" therefore, they should not be limited.[53]Qwest said that Covad failed to support its argument that Tier 1 payments did not compensate it sufficiently; as Qwest noted,[54] there was no Covad accounting of the tangible or intangible costs or damages it suffered through substandard performance from Qwest. Qwest argued further that no CLEC presented any evidence that would verify any customer loss due to Qwest's performance or that would address the frequency with which they would lose customers for such reasons. Qwest also said that there was no CLEC evidence about the expenses or investments that they incurred due to poor Qwest performance.[55]

Discussion: There certainly was extensive criticism of Qwest's attempt to relate QPAP payments to the level of damage or harm suffered by CLECs as a result of poor Qwest performance. However, Qwest was correct in arguing that CLECs did not present substantial evidence to show what their damages had been or would be. Covad presented no such evidence. AT&T, in fact, appeared to say that a quantified assessment of all CLEC damages could not be undertaken by anyone, because of the inability to quantify intangible damages at all.

This AT&T argument actually supports liquidating such damages, as opposed to merely abdicating the responsibility to prove an "unprovable" to some other decision maker. Because such damages will prove no easier to quantify after the fact or by some other trier of fact, we should address them here; they fit precisely the kinds of liquidation needs for which such damage provisions are intended. It may not often be admitted candidly, but if judges and juries in the civil system were better at pondering the magnitude of damages of this type, we would not need liquidated damages clauses. We conclude that such a clause is indeed appropriate here, given the nature of the harm and the disagreement not only about how to measure it, but also about whether it can be measured at all.

[51] Covad Initial PAP Brief at page 29.
[52] WorldCom Initial PAP Brief at pages 5 and 6.
[53] AT&T Initial PAP Brief at page 23.
[54] Qwest Reply PAP Brief at page 10.
[55] Qwest Initial PAP Brief at page 10.

The question therefore remains whether the QPAP payments represent a reasonable approximation of the harm that CLECs suffer. Qwest's principal evidence of consequence on that question was not lost CLEC profits, or a direct analysis of CLEC costs. Rather it was an approximate equation of service price with service value. Lost CLEC profits, while comprising another line of Qwest evidence, was not alone, or in our judgment, even weighty. The CLEC community is, we suspect, probably nearly unanimous in arguing that Qwest's UNE prices substantially exceed its economic costs. In light of that consensus, it would be curious to argue that price is not, in fact, a very generous representation of value.

Turning then to the lost profits analysis, we first noted that, while criticizing Qwest for not addressing a variety of charges, WorldCom failed to present an analysis seeking to quantify harm. Moreover, it would appear that Qwest's analysis did implicitly consider all CLEC costs by translating QPAP non-recurring-charge payments into equivalent months of service. If there is a more direct way of considering these payments, neither WorldCom nor any other participant has chosen to provide even a gross quantitative measure of it. Certainly, it has not been shown to be sound merely to layer a refund of those payments on top of the QPAP payments proposed by Qwest. What else we might constructively do with the WorldCom evidence is not at all clear. Covad similarly failed to provide its own evidence of lost profits, choosing to stand on a criticism of Qwest's method.

We found Qwest's analysis to be largely based not on its own knowledge, but upon what another party said about CLEC profits. It was not compelling testimony and it had only marginal weight in our analysis. In its complete absence, we would conclude that the suitability of the QPAP payment levels as an approximation of CLEC damages was sufficient. Thus, the CLEC criticisms, which in any event did little to change the weight to be given to Qwest's evidence, would have made little difference even had they been better developed. We might have faced another situation had CLECs chosen to present their own quantification of lost profit and other harm for comparison to the QPAP payments. The record clearly would have benefited from CLEC presentations of a structured and comprehensive attempt to measure their harm. Uniformly, however, they chose not to do so.

3. Preclusion of Other CLEC Remedies

Sections 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages, which are designed to provide, for CLECs that opt into the QPAP, an exclusive remedy to compensate for damages resulting from Qwest service in fulfilling its wholesale performance obligations. Qwest said that Sections 6.1 of the Texas, Oklahoma, and Kansas plans make the same provision. In return for the right to such payments without the necessity to prove harm, Qwest in return would secure what it considers a commonly provided consideration; i.e., that other damages arising from the same, or analogous performance will be waived.[56]

ELI/Time Warner/XO Utah said that one of the distinguishing features of the QPAP from other PAPs that have formed part of 271 applications that the FCC approved is Qwest's

[56] Qwest Initial PAP Brief at page 66.

insistence that CLECs waive other remedies for recovery of damages.[57] ELI/Time Warner/XO Utah argued that a CLEC should not be foreclosed from opting to take other remedies, such as those available under state public service commission rules, even where it has chosen to avail itself of QPAP remedies.[58]

AT&T proposed the approach of the Colorado Special Master for addressing other remedies. AT&T described that approach as allowing CLECs to seek contract remedies even after accepting PAP payments, in those cases where CLECs could demonstrate to an arbitrator or mediator a reasonable damage theory that would show that the PAP payments it has received were not fully compensatory.[59] Qwest did agree that the QPAP would not preclude CLEC claims based on non-contractual causes of action, nor would it limit federal enforcement action under section 271(d)(6). However, Qwest did say that the offset provision of the QPAP (Section 13.7) would apply to non-contractual remedies.[60]

Discussion: The Texas plan does in fact place substantial limitations on other remedies. It provides as follows:[61]

> *5.2. SWBT will pay Liquidated Damages to the CLEC according to the terms set forth in this Attachment.*
>
> *…*
>
> *6.1. SWBT agrees that the application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and regulatory claims and remedies that may be available to a CLEC. By incorporating these liquidated damages terms into an interconnection agreement, SWBT and CLEC agree that proof of damages from any "noncompliant" measure would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damage resulting from a non-compliant performance measure. SWBT and CLEC further agree that liquidated damages payable under this provision are not intended to be a penalty.*

The Texas plan is intended to limit additional recovery under causes of action that sound in contract. Such a provision is reasonable as a means of precluding double recovery, while at the same time allowing for recovery of damages that result from other theories of liability, such as those grounded in tort or anti-trust law.[62] The Colorado Special Master's Report generally would produce a similar result; i.e., suits under non-contractual theories will be allowed. That report provides that:[63]

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[57] ELI/Time Warner/XO Utah Initial PAP Brief at page 12.
[58] ELI/Time Warner/XO Utah Initial PAP Brief at page 23.
[59] AT&T Reply PAP Brief at page 9.
[60] Qwest Initial PAP Brief at page 68.
[61] Exhibit S9-ATT-JFF-8, at pages 19 and 20.
[62] Note that there is an issue, which is to be addressed subsequently, that is related to but distinct from the narrow question at issue here, which is whether noncontractual causes of action are and should be prohibited by the QPAP. That separate question is the degree to which payments under the QPAP should offset any damages that may be awarded in such other, noncontractual proceedings.
[63] Exhibit S9-WCM-CEW-3.

> [T]*he PAP shall not limit alternative remedies available to CLECs under (1) Section 251/252 remedies that supplement the PAP (as opposed to those which overlap with the PAP) and are subjected to the procedural pre-filing requirement set out below; (2) state law regulatory enforcement actions that are not redundant with the PAP (e.g., any action by the state that does not result in payment of money to a CLEC would not be redundant to the PAP); (3) federal enforcement action under Section 271(d)(6); or (4) any applicable antitrust, tort, or consumer protection remedies.*

However, the pre-filing requirement cited in that report does appear to allow a CLEC to seek leave to file an action based in contract law where it can show a reasonable damage theory that would Qwest payments do not fully redress the competitive harm suffered by a CLEC. It is this provision that AT&T focuses on in supporting the approach recommended by the Colorado Special Master's Report.

Qwest's reply brief reflected a general commitment not to preclude noncontractual actions. Qwest cited the last sentence of QPAP Section 13.5, which provides that:

> *The application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.*

Taken by itself, this section provides protection that is comparable to that set forth in the Texas plan and in the Colorado Special Master's Report. However, Section 13.6 contains language that could be construed as contradictory:

> *To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest in lieu of other alternative standards or relief. In no event is CLEC entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. Where alternative remedies for Qwest's wholesale performance are available under rules, orders, or other contracts, including interconnection agreements, CLEC will be limited to either the PAP remedies or the remedies available under rules, orders, or other contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.*

These provisions cannot be interpreted clearly and consistently when read together. The second provision extends beyond prohibiting double recovery for the same damages; it precludes any alternative remedies, whether they encompass broader or different damages. It is essential that we not confuse two related, but distinct legal concepts: (a) the theory of liability, which identifies the conduct to which liability attaches, and (b) the nature of the damages that flow from such liability. A tort remedy, for example, might include some of the same damages recoverable in a contract action, while allowing additional types of recovery. What we need to do ultimately is to preserve the ability to allow CLEC recovery for those additional forms of recovery, whatever the action brought to secure them. At the same time, we need to make sure that from any such recovery

there is deducted in one way or another the contract damages amount, for which the QPAP should provide. We should therefore seek here language that does the following:

- Prohibits all causes of action based on contractual theories of liability
- Prohibits the recovery of amounts related to the harm compensable under contractual theories of liability under non-contractual causes of action that also permit the recovery of damages recoverable under contractual theories of liability
- Allow for the recovery under noncontractual theories of liability those portions of damages allowed by the applicable theory that are not recoverable under contractual theories of liability.

Anti-trust law provides a useful example of the application of these three principles. The QPAP should allow anti-trust actions. If an anti-trust action produces a base damage award of $200,000 for direct harm for contract breach, and a tripling of that amount, the base $200,000 should be considered as duplicative of the QPAP payments, while the $400,000 adder should not.

To make the QPAP conform to these principles, all the quoted portions of Section 13.6, following the phrase "in its interconnection agreement with Qwest" should be stricken. Qwest may replace them with a simple provision requiring a CLEC to elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP. Those limits are the bar on other contractual remedies and on double recovery (although the propriety of the latter remains to be discussed).

The Colorado Special Master's Report, as AT&T interprets it, would produce a substantially imbalanced result. That interpretation would allow a CLEC added compensation under contract theories where it could prove that its harm exceeded its payments. It would, not, however, allow Qwest to take back any of the PAP payments, even where it could show that they exceeded CLEC harm. It would be one thing to delete the Tier 1 payments altogether, requiring CLECs to show harm and to demonstrate its amount. This approach could be accompanied by moving the Tier 1 accelerated payments to Tier 2. However, it is not reasonable to allow CLECs to keep Tier 1 base payments and Tier 1 accelerated payments when it suited them, but to seek more when it did not.

One of the things that make liquidated damages appropriate is that they liquidate them for both sides. There is no reasonable basis for requiring one party to take the risk that payments will exceed actual harm while allowing the other party to avoid the risk that the payments will be less than actual harm.

We are similarly not persuaded of the reasonableness of the ELI/Time Warner/XO Utah recommendation that CLECs retain the right to choose to take other remedies even after electing to take advantage of QPAP payments. It is reasonable to require CLECs to choose to take all or none of the QPAP remedies. Otherwise, we would invite debate about which specific QPAP payment elements correspond to those otherwise available remedies. The QPAP represents a comprehensive payment structure for compensating CLECs for harm. They have the right to elect all of it or none of it. It would not be reasonable to allow them to select those portions of it that are on balance more favorable than other remedies, while choosing to take other remedies in cases where they are more

favorable. Qwest has no right to do so; a proper sense of balance with respect to liquidated damages should require the same of CLECs.

4. Indemnity for CLEC Payments Under State Service Quality Standards

AT&T proposed that Qwest be required to compensate CLECs for any payments that CLECs must make for failing to meet state or federal service quality rules, provided that Qwest wholesale service deficiencies cause the CLEC failures.[64] ELI/Time Warner/XO Utah noted that the issue of Qwest indemnity for CLEC payments for failing to meet state service quality standards was addressed earlier in these workshops. ELI/Time Warner/XO Utah believed that this provision, which could involve dispute and litigation, should therefore be addressed elsewhere in the SGAT, not in the QPAP. ELI/Time Warner/XO Utah sought to assure that the QPAP not preclude such indemnification.[65]

Qwest objected to an added requirement that it compensate CLECs for assessments that state commissions make against CLECs for violating state service quality standards. Qwest noted that the QPAP's liquidated damages provision contemplates full payment for harm arising from the same performance; therefore, there should not be any added payment for this element of damages. Moreover, Qwest observed, such a provision would engender litigation about whether Qwest's performance did or did not lead to the failure of a CLEC to meet retail standards.

Discussion: The merits of requiring such indemnification were fully addressed in prior workshops.[66] Given that Utah has specific service quality rules that do impose possible penalties on carriers, the one-size fits all (nine states) approach is not merited. If a CLEC can demonstrate that the specific Qwest failure in question caused them to be physically incapable of meeting a Utah service standard that resulted in the CLEC being fined, and if at such time Qwest has an opportunity to respond, and the Commission finds in the CLEC's favor, then the Commission may order that the fine be assessed against Qwest without altering any payment obligations arising out of the QPAP provisions.

5. Offset Provision (Section 13.7)

Qwest changed Section 13.7 to respond to concerns about its breadth. After the change, QPAP Section 13.7 provides that:[67]

> *13.7 If for any reason Qwest is obligated by any court or regulatory authority of competent jurisdiction to pay to any CLEC that agrees to this QPAP compensatory damages based on the same or analogous wholesale performance covered by this PAP, Qwest may reduce such award by the amount of any payments made or due to such CLEC under this PAP, or may reduce the amount of any payments made or due to such CLEC under this PAP by the amount of any such award, such that Qwest's total*

[64] AT&T Initial PAP Brief at page 18.
[65] ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[66] See the *Report on Checklist Items 1, 11, 13, and 14*, issued on May 15, 2001.
[67] See Attachment I to *Qwest Corporation's Responses to Oral Questions by Mr. Antonuk at the August 14-17, 2001 Hearings*, which changed this and a number of other SGAT sections that were included in the original QPAP filing.

liability shall be limited to the greater of the amount of such award or the amount of any payments made or due to such CLEC under this QPAP. By adopting this QPAP, CLEC consents to such offset.

AT&T objected to this section as revised on several grounds:[68]

- That no FCC order has allowed a BOC a unilateral right to make an offset and that the right to an offset is the province of the finder of fact under common law
- That there was confusion about the intent of the language about "analogous performance."

With respect to the question of who should determine an offset entitlement, Qwest was concerned about continuing to allow a compensating reduction in PAP payments where an outside decision maker; e.g., a court, would not permit QPAP payments to offset any damages it might award. With respect to the question of analogous performance, Qwest explained that the intent of this section was to preclude the construction of the term "performance" as meaning a "standard" rather than an "activity." Qwest added the word "analogous" to make it clear that Qwest was entitled to an offset where the same Qwest wholesale service or activity, "even though it may be measured or accounted for in different manners," produced compensatory damage awards.[69]

WorldCom did not object to precluding double recovery, but argued that the term "analogous performance" was too ambiguous, undefined, and likely to cause litigation, citing the fact that the Qwest witness presented to explain this provision could not define what the term meant. WorldCom asked that the phrase be stricken.[70]

ELI/Time Warner/XO Utah argued similarly to AT&T that the awarder of the damages in question, whether or not it were a commission with responsibility for administering the SGAT or interconnection agreement involved, should decide the propriety of an offset and that the offset should be only for the same performance, not analogous performance.[71] Qwest responded that the CLEC provision limiting Qwest's offset rights to an argument before the trier of fact would foment litigation.[72]

AT&T proposed the adoption of offset language from the Texas plan.[73] ELI/Time Warner/XO Utah said that the term analogous should be eliminated, and that Qwest should not have finally the right unilaterally to determine offset rights, but should be required to seek any requested offset from the "trier of fact."[74] Covad argued generally against the need for and the propriety of including an offset provision in the QPAP.[75]

Discussion:

[68] AT&T Initial PAP Brief at pages 4 and 5.
[69] Qwest Initial PAP Brief at pages 68 and 69.
[70] WorldCom Initial PAP Brief at page 18.
[71] ELI/Time Warner/XO Utah Initial PAP Brief at pages 23 and 24 and ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[72] Qwest Reply PAP Brief at page 46.
[73] AT&T Reply PAP Brief at page 25.
[74] ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[75] Covad Initial PAP Brief at page 42.

(a) Unilateral Right to Offset: In general, the state level rules which may lead to payments that Qwest wishes to have counted toward an offset arise out of state level concerns that have to do with service quality to the end user, or to the ILEC wholesale customer. While somewhat related to the backsliding incentive concerns inherent in the role of a PAP, they are distinct. If Qwest engages in behavior that generates state level payments, that activity should be considered in a distinct forum and accounting system different from the payments generated by the QPAP. There should be no right to offset included in the QPAP. If Qwest desires, it may petition the Utah Commission for a change in the Utah rules that would provide an offset. At that time, the Commission could consider all of the public policy aspects of the proposed change. Until such time as a Utah level investigation or hearing is conducted, the case for offsets has not been made, and none should be allowed.

(b) Injury to Persons or Physical Property: There remains one other technical problem with the Qwest language. The same performance might produce liability for: (a) CLEC business loss and incentives for Qwest to perform, and (b) physical damage to property or personal injury. The QPAP has nothing to do with compensation for physical property damage or personal injury, but other SGAT provisions recommended in an earlier report from these workshops do.[76] In order to preserve the effect of those sections, QPAP Section 13.7 should contain a provision stating that:

> *Nothing in this QPAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.*

6. Exclusions (Section 13.3)

QPAP Section 13.3 contains a list of circumstances that excuse Qwest from Tier 1 and Tier 2 payments in the event that certain listed events occur. Qwest said that these QPAP exclusions are similar to those of the Texas PAP, under which SBC has invoked a payment excuse only once to date. Observing that the QPAP requires it to prove the entitlement to invoke exclusions, Qwest generally considered the CLEC-proposed changes to this section inappropriate.[77]

(a) CLEC Bad Faith: AT&T wanted to strike the exclusion for bad-faith CLEC acts or omissions on the grounds that it was ambiguous.[78] ELI/Time Warner/XO Utah wanted to strike it for being unnecessary, because good faith by all parties is an implicit requirement of commercial relationships such as this one.[79] Qwest argued that this provision was appropriate to protect Qwest against actions that have the "foreseeable effect of causing Qwest to miss a performance standard."[80] ELI/Time Warner/XO Utah countered that neither a CLEC's ability to foresee Qwest's inability to respond nor the fact that a CLEC could somehow have reduced Qwest's burden in responding to CLEC requests should be determinative of whether the CLEC had exercised bad faith.

[76] *Report on Group 5 Issues: General Terms & Conditions, Section 272 and Track A*, issued on September 21, 2001.
[77] Qwest Initial PAP Brief at page 73.
[78] AT&T Initial PAP Brief at page 6.
[79] ELI/Time Warner/XO Utah Initial PAP Brief at page 22.
[80] Qwest Initial PAP Brief at page 75.

Otherwise, such a standard could be used to exclude Qwest from its clear obligation to perform reasonably. ELI/Time Warner/XO Utah argued that bad faith, should it remain an exclusion, should be limited to cases where CLECs deliberately manipulated their orders with intent to cause Qwest to miss performance standards.[81]

(b) Duplicative Force Majeure Provisions: ELI/Time Warner/XO Utah also said that SGAT Section 5.7 already deals with equipment failure as a force majeure event. Qwest agreed to make changes to that section in our earlier workshops. Therefore, these CLECs argued, the QPAP should simply only refer to Section 15.7; it should not set forth a broader exclusion, which would weaken the standard set forth in the SGAT.[82] WorldCom also supported the use of the force majeure language from SGAT Section 5.7.[83] AT&T sought to strike the equipment failure exclusion from Section 13.3 as ambiguous, broad, and duplicative of the Section 5.7 force majeure provision.[84] WorldCom proposed to use the Colorado Special Master's Report language for third-party and vendor exclusions.[85]

Qwest said that a separate QPAP force majeure provision was appropriate, in order to eliminate the need for extensive cross-referencing to other SGAT provisions.[86]

(c) Resolving Disputes Over Force Majeure Events: AT&T noted that the QPAP was silent about who would determine whether Qwest had met its burden to show that non-performance under the QPAP resulted from an allowable exclusion. Qwest did say in testimony that the public service commission should decide any disputes about causation. AT&T requested the inclusion of a specific reference to commission authority to resolve such disputes.[87] SGAT Section 5.7 does not contain such a reference. WorldCom proposed detailed language to address the meeting of Qwest's burden of proof.[88] WorldCom also proposed that the QPAP require contemporaneous notice of a Qwest force majeure claim -- not merely a notice (which could come long after the fact) with the applicable bill credit statement.[89]

(d) Nexus Between Force Majeure Events and Qwest Performance: AT&T would add language explicitly requiring the demonstration of a nexus between an allowable force majeure event and Qwest performance, requiring further that the event render performance by Qwest "impossible." AT&T would also include language limiting any time extension on Qwest performance to the duration of the force majeure event.[90] Z-Tel proposed that any force majeure condition related to equipment failures be limited to a 72

[81] ELI/Time Warner/XO Utah Reply PAP Brief at page 13.
[82] ELI/Time Warner/XO Utah Reply PAP Brief at page 14.
[83] WorldCom Initial PAP Brief at page 16.
[84] AT&T Initial PAP Brief at page 6.
[85] WorldCom Initial PAP Brief at page 17.
[86] Qwest Initial PAP Brief at page 74.
[87] AT&T Initial PAP Brief at page 6.
[88] WorldCom Initial PAP Brief at page 7.
[89] WorldCom Initial PAP Brief at page 16.
[90] AT&T Initial PAP Brief at page 7.

hour duration.[91] Qwest pointed out that QPAP Section 13.3 requires that the failure of wholesale performance to be "the result of" the force majeure event.[92]

(e) Applicability of Force Majeure to Parity Measures: AT&T argued that force majeure should not be an excuse for failing to meet parity measures, because Qwest should still be able to meet the standard, which is that CLEC service be no worse. AT&T cited the Colorado Special Master's Report as supporting this conclusion. WorldCom made a similar argument.[93] Qwest said that a force majeure exclusion was appropriate for parity measures, because the extensive geographical range of Qwest's operations could cause an external event to have differential impacts on Qwest customers and CLEC customers.[94]

(f) CLEC Forecast Exclusion: WorldCom and Covad would limit the exclusion for CLEC failures to forecast to failures to provide those forecasts required by the SGAT.[95] Qwest would agree to language limiting the triggering forecasts to those "reasonably required under the SGAT or state rules to provide services or facilities."

Discussion:

(a) CLEC Bad Faith: That good faith by all parties is to be generally presumed in contractual undertakings cannot be disputed. However, this general principle may not serve to address the specific concerns that are at issue here. There is merit in an explication of the circumstances in which CLEC efforts (not that we in any measure predict them) to manipulate performance results will be to no avail. The stakes are high for all the participants in the marketplace that Congress has sought to induce; it is neither surprising nor inappropriate that the measure of those stakes in the case of this Utah QPAP are in the several millions of dollars annually.

The QPAP should therefore not be criticized for specifying when Qwest may be relieved of payment responsibility by virtue of such theoretically possible manipulative conduct. We should turn therefore, not to the arguments about presuming good faith, but to those that seek to define more precisely what it means in this context. ELI/Time Warner/XO Utah have properly alerted us to the fact that a CLEC should not be penalized for conducting its business in an otherwise reasonable way, merely because Qwest might be incapable of operating at an acceptable performance baseline, solely because that CLEC knows that Qwest suffers such an inexcusable weakness.

Having described its intent in designing the QPAP section in question, we are now forewarned about how Qwest may intend to apply it, and we are wary of the fact that our failure to respond to such a foreseeable application could be construed as an acceptance of a particular construction of the words that the provision uses. Therefore, we find it necessary to state an agreement with the position of ELI/Time Warner/XO Utah that:

> *Notwithstanding any other provision of this QPAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver*

[91] Z-Tel Initial PAP Brief at page 33.
[92] Qwest Initial PAP Brief at page75
[93] AT&T Initial PAP Brief at page 7; WorldCom Initial PAP Brief at page 16.
[94] Qwest Initial PAP Brief at page 74.
[95] WorldCom Initial PAP Brief at page 18; Covad Initial PAP Brief at page 55.

> *assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable volumes and patterns of demands upon its resources by CLECs.*

The insertion of such a provision as a new subsection following QPAP Section 13.3 is therefore appropriate to assure that there is not a material dilution of the operation of the QPAP as a meaningful and significant incentive to Qwest.

(b) Duplicative Force Majeure Provisions: Qwest has not made a convincing argument that the QPAP requires its own separate and different force majeure provision. The issue is not at all about whether cross-referencing to other QPAP sections will be "extensive." It will not; what would suffice is a simple replacement of clause (1) of QPAP Section 13.3 with the following phrase: "a Force Majeure event as defined in Section 5.7 of the SGAT." More than this has been commonly done in the SGAT on other subjects, in order to provide proper cross-referencing.

The more material issue is whether something about payments for non-compliant service calls for force majeure provisions that differ from those SGAT provisions that define what the underlying service obligations are in the first place. Qwest did not provide sound support for making a distinction, nor is any self-evident to us. To the contrary, if the SGAT creates an expectation of service subject to specific qualifications, there should be a strong presumption that the economic consequences for failing to meet the expectation should rest upon the same exclusions. Otherwise, we would face a question that represents an imponderable one on the record before us. That question, quite simply, is whether the performance standard or the consequence standard is the one that is too high.

(c) Resolving Disputes Over Force Majeure Events: It is appropriate to clarify the entity to whom Qwest must make and defend, against dispute if necessary, its determination that force majeure events have occurred. In examining Qwest's proposed new dispute resolution language, however,[96] we find that Qwest has in fact identified the resolver of disputes, which is the public service commission of each state. We consider that approach appropriate, with other changes that are not material here (see the *Dispute Resolution* section of this report). However, Qwest should be required by the QPAP to provide notice of its claims of the occurrence of force majeure events within 72 hours of learning of them, or after it reasonably should have learned of them. It would not be appropriate to allow Qwest to search back in time for excuses after it discovers that it will not meet standards, nor is it appropriate to require CLECs to research facts surrounding events that have become stale.

(d) Nexus Between Force Majeure Events and Qwest Performance: Whether it be QPAP Section 13.3 or SGAT Section 5.7, there is already a clear requirement that a force majeure event be the cause of a failure of Qwest performance. Moreover, it is not proper to adopt the extremely high standard of impossibility of performance. It is likely in many instances that Qwest could still perform up to standard, or at least closer to it, if it were to undertake extraordinary efforts that do not consider economy of resources. The burden on Qwest should be to undertake reasonable and efforts to mitigate, not to accomplish the

[96] See the proposed QPAP Section 18.0 language proposed at page 79 of Qwest's Initial PAP Brief.

extraordinary, whatever the cost. We construe the existing language as providing so already. In addition, establishing a fixed duration on any force majeure event is: (a) not consistent with the nature of such events, (b) as likely to be over-protective as under-protective, and (c) is otherwise unnecessary, because the burden on Qwest is not only to show the existence of an event, but to show its nexus to performance failure and to demonstrate the time period during which the event and this nexus existed.

There is merit in the AT&T language specifying the method for calculating the impact of a force majeure event on interval measures. It should be added to clarify the method for calculating QPAP payments when force a majeure event should have less than a completely excusing impact.

(e) Applicability of Force Majeure to Parity Measures: Qwest is undoubtedly correct in observing that a force majeure event could have differential effects on the services it provides for its own end users and the services that it provides for CLECs. We must nevertheless ask ourselves why it should be presumed that the differential effect must always work in one direction. We would answer that the differential effect would, on a basis relative to CLEC performance, sometimes lessen the quality of Qwest's service for itself and sometimes increase it.

With that answer in hand, we would then be correct to observe that Qwest's provision only allows itself the benefit of choosing when to apply the QPAP's force majeure provisions. While the reasonableness of declaring the necessary conditions to exist will be reviewable, nothing would allow a decision not to declare to be reviewed. That difference is sufferable as a general rule. However, it simply would deny basic fairness to permit Qwest both to: (a) avoid parity-measure payments when it decided that the impairment to service for its own end users was lesser, while (b) meeting parity standards that it might otherwise have failed when the impact on its own end users was greater.

The Colorado Special Master, as he did in so many other cases as part of his fine efforts for the commission there, got the solution to this issue just right. Parity, although in a somewhat different sense, requires that parity measures not be subject to force majeure payment exclusions.

(f) CLEC Forecast Exclusion: While for the general (nine state) QPAP Qwest's concession puts most of the problem behind us, the QPAP continues to reach a scope that appears inappropriately wide, given the need for the document to operate reasonably free of litigation risk. Particularly troublesome is the provision about forecasts under state rules. Since Utah has specific forecasting procedures, we recommend that the QPAP make explicit that the application of these rules is not altered in any way by the QPAP provisions. Further, the QPAP must acknowledge (as the Commission's Order on Workshop 2 explained) that the forecasts required of Utha CLECs must be consistent with the Utah rules, or must not be the mechanism by which any penalties redound to the CLECs.

This change will deal as well with the other material concern about Qwest's offer. By definition, the SGAT cannot be read as requiring any forecast whose provision would be "unreasonable." Therefore, Qwest's use can only be logically read as implying that the SGAT can be read as reasonably requiring yet additional forecasts in this particular context. It would create far too much ambiguity to include a provision that may be

interpreted as authorizing the compulsion of additional, yet unspecified forecasts under the terms of the SGAT. Identifying the specific forecasts that were to be required formed much of the debate in prior workshops. It simply will not do to introduce a troublingly undefined and shadowy provision that might do indirectly what we seek to prohibit directly.

7. SGAT Limitation of Liability to Total Amounts Charged to CLECs

ELI/Time Warner/XO Utah noted that SGAT Section 5.8.1 limits Qwest and CLEC total liability (except for willful misconduct) to the total amount charged under the SGAT for the applicable year. As ELI/Time Warner/XO Utah note, this SGAT provision expressly does not limit QPAP payments; however, nothing provides that QPAP payments do not limit the other damages, to which this section applies.[97]

Discussion: Now that the QPAP is before these workshops, we can conclude that the payments addressed by SGAT Section 5.8.1 and by the QPAP are mutually exclusive. Qwest's liability for property damage and personal injury should not be limited by QPAP payments, just as QPAP payments should not be limited by payments for property damage and personal injury. Therefore, SGAT Section 5.8.1 should include a provision stating that:

> *Payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section.*

D. Incentive to Perform

1. Tier 2 Payment Use

AT&T urged the elimination of the QPAP Section 7.5 requirement that Tier 2 payments be limited to use for purposes that relate to the Qwest service territory.[98]

Discussion: The proper construction of the Qwest language is that the restriction applies only to payment amounts to be administered by the Commission. Should the Commission administer those funds the restriction is not necessarily appropriate. It should not be presumed that Commission powers are so limited. There should also be no restriction on payments made to the general fund. Therefore, QPAP Section 7.5 should be replaced with the following.

> *Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose determined by the Commission that is allowed to it by state law. If the Commission is not permitted by state law to receive or administer Tier 2 payments to the state, the payments shall be made to the general fund or to such other source as may be provided for under state law.*

While not addressed by the participants, the Colorado Special Master's Report (at Part VII) recommended a novel method for funding what may be significant administrative and dispute resolution responsibilities for the states that will receive such funds. As these

[97] ELI/Time Warner/XO Utah Initial PAP Brief at page 25.
[98] AT&T Initial PAP Brief at page 10.

multi-state workshops have demonstrated, many, if not all of the Qwest states, can find it efficient to address wholesale telecommunications services issues on a combined basis. More critically, some states simply may not have the resources necessary to carry out the many burdens that the SGAT, interconnection agreements, the QPAP, federal law, and FCC regulations impose upon them. The creation of a funding mechanism to support state commission activities represents a proper use of a portion of Tier 2 payments and, if necessary, of a fraction of the escalated portion of Tier 1 payments.

The QPAP should provide that up to one-third of the state's Tier 2 payments be made to a special fund that would be available for states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunications service activities determined by the participating commissions to be best carried out on a common basis. Qwest should also be required to make an advance payment against future Tier 2 obligations in an amount reasonably determined by the participating commissions to fund the preceding listed activities on an interim basis.

The Colorado Special Master's Report recommended a particular form of administrative structure for carrying out the activities listed above. Given the multi-state nature of the effort envisioned here, as opposed to the single-state process addressed there, it is preferable to allow the states interested in participating to give consideration to the best means for designing and implementing a common administrative structure.

2. Three Month Trigger for Tier 2 Payments

The QPAP requirement that non-compliance extend to three consecutive months before Tier 2 payments would be triggered concerned a number of participants. Qwest argued that there were sound reasons why Tier 2 payments should, unlike Tier 1 payments, not begin at the first month. Qwest said that the Tier 2 payments were not compensatory to CLECs, but were designed to add to Qwest's incentives to perform. Given the lag involved in identifying continuing problems and in taking steps to meet them, Qwest considered it appropriate to allow a three-month correction period, which it said is identical to how Tier 2 payments work in the Texas, Oklahoma, and Kansas plans.[99]

AT&T argued that payments should begin after a single month of non-compliant performance, in order to assure that there are effective sanctions for poor performance on Tier 2 measures.[100] The New Mexico Advocacy Staff argued that the payment lag proposed by Qwest would serve to postpone the need for Qwest to begin to address performance problems associated with Tier 2 measures.[101] AT&T said that Qwest has more than its regulatory reporting systems to advise it of any problems that it may be having in meeting obligations to CLECs. Qwest's own internal information sources, according to AT&T, should highlight areas requiring management attention earlier than three months after the fact.[102]

[99] Qwest Initial PAP Brief at page 25.
[100] AT&T Initial PAP Brief at page 11.
[101] New Mexico Advocacy Staff Initial PAP Brief at page 16.
[102] AT&T Reply PAP Brief at page 14.

Discussion: A point that is missed by the parties is that the State has an interest in having Qwest perform adequately. The State of Utah has as legislative policy: The promotion of competition in the telecommunications market place. To have a blanket policy that the Tier 2 payments do not start until many months of poor performance have occurred provides poor incentives to Qwest. For measures that do not have a Tier 1 counterpart, one compliant month out of every three absolutely is not considered adequate for those measures. Therefore, for these measures Tier 2 payments will begin just as the Tier 1 payments do. Any escalation should then take place as provided in the proposed QPAP, while assuring that payments do not drop back to zero until there is reached a point where there has been no occasion in the preceding 12 months during which non-compliant Tier 2 performance has occurred.

There remains the question of whether the performance inducement for Tier 2 payments that have Tier 1 counterparts is sufficient, given the three-consecutive-month requirement for Tier 2. Qwest's principal defense of the QPAP provision at issue was two-fold: (a) the need for time to identify and resolve long-term problems, and (b) consistency with other plans that the FCC has reviewed. The time-lag issue would be resolved by the adoption of the recommended approach for triggering Tier 2 payments for measures without a Tier 1 payment counterpart. However, it does appear that the Texas plan adopts the same three-consecutive-month trigger for Tier 2 payments. Nevertheless, given the emphasis placed on Tier 2 payments as an inducement, it remains difficult to place much faith in their contribution to a performance incentive plan when they can be avoided (even under measures where there are Tier 1 payments) by concerted efforts to bring performance to minimum acceptable levels only four months each year. Such a program appears more likely to lead to frequent underperformance than it does to encouraging routine compliance. In the case of Tier 2 payments that have Tier 1 counterparts, therefore, the QPAP should trigger Tier 2 payments in the second consecutive month of non-performance.

3. Limiting Escalation to 6 Months

Qwest supported the QPAP's limitation of payment escalation to six months on a number of grounds:[103]

- There was no evidence that such a limit would fail to provide Qwest sufficient incentive to meet performance standards
- Continuing escalation would substantially overcompensate CLECs (the Tier 1 and Tier 2 payments combined were already equivalent to giving CLECs free wholesale service for between 7 and 15 years, Qwest said)
- Such overcompensation would remove CLEC incentives to invest in their own facilities.

AT&T, ELI/Time Warner/XO Utah, WorldCom, Z-Tel, Covad, and the New Mexico Advocacy staff were among those who argued that escalation should continue after six months, rising as necessary to succeed ultimately in inducing Qwest to perform up to

[103] Qwest Initial PAP Brief at page 21.

standards.[104] WorldCom said that the fact that Qwest even now has been missing some standards for more than 6 months shows that the threat of 6-month escalation is not a sufficient inducement to perform adequately.[105] Z-Tel said that there is no doubt in concluding that, where performance remains below standard for six consecutive months, the payment levels were insufficient to induce compliance by Qwest. Therefore, according to Z-Tel, it follows that there should be continued escalation until performance comes up to standards. Z-Tel also suggests that there is systematic discrimination being shown if such performance continues past six months.[106]

Discussion: First, it may not be self-evidently clear that continuation of poor performance past six months means that there was a methodical calculation by Qwest that the continuing costs of compliance exceeded the continuing costs of violation. However, it is abundantly clear that a significant problem of either economic incentive or technical difficulty must exist. Since all of the measures involved in the proposed QPAP are derivative to the ongoing ROC-OSS testing effort, it is clear that Qwest should be able to meet all of them. Because the ROC-OSS testing is "military style," Qwest will have already demonstrated its ability to meet each one of the measures prior to any application for interLATA relief. Further, there is certainly a common belief and expectation that Qwest can meet all of these measures; otherwise, it is difficult to see why Qwest would have agreed to them. Qwest, in effect, is arguing that the inability to meet a performance standard problem after six months translates into the belief that the standard is not practically meetable. However, as noted above, the assumed successful completion of the ROC-OSS test erases all validity for this line of argument.

We decline to recommend a six-month cut-off on escalation. We note that Qwest is always free to petition the Commission for relief and to change some standard in the QPAP if future evidence substantiates that initial miscalculations caused inappropriate standards to be designed in the first instance.

4. Splitting Tier 2 Payments between CLECs and the States

Qwest said that Covad's proposal for such a split was based on a misreading of the Colorado Special Master's Report; the report's splitting provisions related to Tier 1.Y payments, not to Tier 2 payments. Colorado's Tier 1.Y corresponds to the portion of QPAP Tier 1 payments that escalate for consecutive months of non-compliant performance. As Qwest noted, the escalation portions of Tier 1 payments already go to CLECs under the QPAP here.[107]

Discussion: The Colorado Special Master's Report does not support a division of Tier 2 payments between the states and CLECs. Neither does any other plan that exists under a 271 application previously addressed by the FCC. Regardless of whether any other plan supporting this approach, the two tiers of payment are fundamentally for different

[104] AT&T Initial PAP Brief at page 26; ELI/Time Warner/XO Utah Initial PAP Brief at page 13; Z-Tel Initial PAP Brief at page 18; Covad Initial PAP Brief at page 32; WorldCom Initial PAP Brief at page 7.
[105] WorldCom Initial PAP Brief at page 7.
[106] Z-Tel Initial PAP Brief at page 10.
[107] Qwest Initial PAP Brief at page 28.

purposes; splitting payments reduces the effectiveness of the two tiers in achieving correct public policy. Tier 1 payments under the QPAP are adequately compensatory for CLECs. Those CLECs that conclude otherwise may retain their rights to damage recovery through other actions. The goals of the Tier 2 payments are best served by continuing to provide that they be paid to the states.

V. Clearly Articulated and Pre-Determined Measures

A. Measure Selection Process

The Performance Indicator Definitions (PID) document setting forth wholesale performance measures was developed through an extended collaborative process involving Qwest, CLECs, and state commission personnel under the ROC Operational Support Systems (OSS) Process. The PID's performance measures encompass the following interactions between Qwest and CLECs in the context of resale, transport, interconnection, unbundled loops, and other wholesale services:[108]

- Gateway
- Pre-Ordering
- Ordering
- Service
- Provisioning
- Repair
- Network Performance
- Billing

Qwest observed that the PEPP collaborative included extensive negotiations to determine which PID performance measures should be included in the QPAP. Qwest said that, after the completion of that PEPP collaborative negotiation process, it agreed to add two additional diagnostic measures: GA-7(Timely [Gateway] Outage Resolution) and PO-16 (Release Notifications). Qwest also agreed to include a number of other measures not addressed at the PEPP collaborative: OP-17 (LNP Disconnect Timeliness), MR-11 (LNP Trouble Reports Cleared within 24 Hours), and MR-12 (LNP Trouble Reports – Mean Time to Restore).[109]

Discussion: No participant disputed that the PEPP collaborative sought to achieve a broad set of measures to include in the QPAP's payment structure. There was also not, per se, any challenge to the breadth or comprehensiveness of the measures that were agreed to during that collaborative. The issue in dispute essentially was about whether substantial grounds existed for including additional measures. The next sections of this report discuss the merits of adding to what we conclude is generally a well articulated set

[108] Qwest Initial PAP Brief at page 3.
[109] Qwest Initial PAP Brief at page 4.

of pre-determined measures and standards that span the range of carrier-to-carrier performance.

B. Adding Measures to the Payment Structure

1. Requiring Payments for Canceled Orders

ELI/Time Warner/XO Utah recommended that the QPAP provide payments for canceled orders in certain circumstances, arguing that a CLEC's loss of a customer was both significant economically and not otherwise compensated under the QPAP payment structure. In order to implement their recommendation, they would count as a late installation any order canceled after Qwest misses a due date.[110]

Covad argued that there be created a performance measure that would identify the number of orders that CLECs cancel in response to expected service cancellations by Covad customers due to long waits for orders that Qwest places in "held" status due to its lack of facilities.[111]

Qwest responded that it cannot be fairly held responsible for all the reasons why CLECs cancel orders. Qwest argued that the QPAP already sufficiently measures order-filling performance, for so long as orders remain active. Qwest cited, for example, OP-6, which the QPAP includes, and which captures Delayed Days.[112]

Discussion: The QPAP should hold Qwest responsible for the consequences of its failures to perform. There is without question some correlation between the length of delays in providing services to end users and decisions by those users to cancel requests for services from CLECs. However, several conditions should have to be met before deciding that added compensation is necessary to make CLECs whole in such cases:

- The degree of correlation should be shown to be high enough to demonstrate cause and effect to a reasonable degree of certainty
- It should be reasonably clear we would not be adopting a program that would provide CLECs compensation for their own business decisions to cancel orders
- The compensation for any interim sources of delay should be shown to be insufficient, given the degree of the correlation (the weaker the correlation, the more comforted we can be that payments made by Qwest already under the QPAP are sufficient).

These conditions have not been shown to exist here. CLECs presented no evidence to demonstrate the strength of the relationship between Qwest performance and canceled orders. In fact, they have not even presented enough evidence to demonstrate that canceled orders, whatever the reasons, are material in number. In any event, there is no apparent way to craft a provision that would exclude compensation for CLEC decisions to cancel or for end user decisions to cancel for reasons unrelated to performance. The CLECs proposing this measure certainly offered no specific proposal for doing so.

[110] ELI/Time Warner/XO Utah Initial PAP Brief at page 5.
[111] Covad Initial PAP Brief at page 53.
[112] Qwest Initial PAP Brief at page 51.

In the absence of substantial evidence, we consider it reasonable to assume that it generally would take more than nominal delay to cause customers frequently to cancel requests for CLECs to serve them. The QPAP already provides for compensation for delays during the period in which orders remain open, whether or not they are finally canceled. The record available to us allows a conclusion that the QPAP will already serve to compensate CLECs adequately for delays in processing orders, whether or not those orders are ultimately filled.

Covad makes a sound argument about the special circumstances regarding orders "held" for lack of facilities. However, it is not clear that such an identification should produce a separate payment responsibility, given that Covad will continue to receive interval-based payments, despite its internal policy to cancel orders 30 days after their initial due date. It just will not get them for periods of more than 30 days. The usefulness of a held order measure, which we would see as having principally and perhaps solely diagnostic use, Covad should address by presenting its proposal in the forum established for considering new and revised performance measures.

2. Requiring Payments for "Diagnostic" UNEs

Several CLECs noted the importance of EELs to CLECs. They observed that, while the QPAP provides for payments in the case of poor performance for loops and for transport, none exist for EELs, which are a combination of the two. The PID applies no benchmark or parity standards to EELs at present; the performance measures related to them are diagnostic in nature.[113] Qwest's brief acknowledged that, as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark or parity standard, they would be included in the QPAP.[114]

Line sharing and sub-loops are also currently excluded from the QPAP payment structure, because the performance measures for them are diagnostic in nature.[115] Qwest stated that there had been general agreement among the CLECs to exclude line-sharing measurements for the present, but to include them under the nascent service provisions of QPAP Section 10 when a benchmark or parity standard might be adopted.[116]

Discussion: Our prior workshops have made clear the importance of EELs to CLECs. Those workshops also demonstrated that there was not, prior to those workshops, an extensive experience base with EELs until recently. The ROC OSS collaborative properly determined that EELs should be measured on a diagnostic basis for some period of time. As EEL ordering activity increases, this measure should be subjected as soon as practicable to a measurement base that will allow for its prompt addition to the payment structure of the QPAP.

As is the case for EELs, the use of a diagnostic standard reflects the fact that experience with line sharing and sub-loop elements was too limited to support a benchmark or parity standard. Clearly, they should be included in the QPAP payment structure as soon as is practicable.

[113] ELI/Time Warner/XO Utah Initial PAP Brief at page 10; Covad Initial PAP Brief at page 18.
[114] Qwest Reply PAP Brief at page 34.
[115] Covad Initial PAP Brief at page 18.
[116] Qwest Reply PAP Brief at page 23.

3. Cooperative Testing

Covad noted the existence of an agreement under which Qwest will perform acceptance testing in cooperation with Covad for all xDSL loops that Covad leases. Covad testified that Qwest is failing to perform this testing in a significant number of cases. Covad argued that its need for trouble reporting after installation could be diminished if defective loops were discovered, as contemplated, beforehand, during the agreed upon testing. Covad recommended a cooperative testing performance measure as the most effective means of minimizing trouble reports for the xDSL UNE loops that it takes from Qwest. Covad cited a decision of the Texas commission requiring that orders not be marked as complete when an xDSL loop is not provisioned correctly at the outset.[117]

Qwest said that Covad failed to raise the cooperative testing issue at the PEPP collaborative; neither was it raised when the ROC OSS collaborative designed the performance measures set forth in the PID. Given the failure of Covad to offer any substantial reason for adding it now, Qwest argued that it should be rejected.[118]

Discussion: It should not be possible to meet a service order's requirements by supplying a defective or non-conforming UNE. While such events will happen occasionally in a large-volume operation, we should not encourage it as a means of meeting installation-interval measures. Moreover, it is reasonable to require measures appropriate to validate the delivery of a UNE within specifications in those cases where it cannot be taken for granted that the specifications have been met. What Covad has not demonstrated is the difference in QPAP payments that would result from calculating them under maintenance and repair performance measures as opposed to calculating them under installation interval performance measures. Nor does the record indicate how direct and efficient it would be to create a cooperative testing measure that would provide for effective performance measurements and not duplicate the payments to be obtained under existing installation or repair measures.

While it stands to reason that it is better to prevent and detect problems at the earliest possible point, the failure of Covad to raise this issue earlier means that we do not have a sound basis for concluding that Covad's approach, after all other parties have been heard from, would be preferable. Covad should raise the issue in the forum where new or changed performance measures are identified, discussed, and resolved. Should that forum determine that a cooperative testing measure is appropriate, there can then be consideration of how its introduction into the PID should affect Qwest payment responsibilities, if at all after considering the other compensable installation and repair intervals.

4. Adding PO-15 D to Address Due Date Changes

Covad argued that performance measure PO-15 D, which measures the number of due date changes per order, should be included in the Tier 1 payment structure. Covad said that due date changes injure CLECs, because they must subsequently undertake efforts to re-establish reasonable expectations with customers about when service can be

[117] Covad Initial PAP Brief at page 51.
[118] Qwest Initial PAP Brief at page 52.

initiated.[119] Qwest noted that this performance measure is diagnostic in nature, and that neither Covad nor any other party has heretofore offered a parity or benchmark standard that would change it to a benchmark or parity standard, which is required to allow development of a payment calculation basis.

Discussion: Covad offered no recommendation for what the standard should be; this lack is critical, because a diagnostic measure cannot provide a payment calculation basis. We can offer no solution to the Covad concern on this record.

5. Including PO-1C Preorder Inquiry Timeouts in Tier 2

AT&T commented that performance measure PO-1C should be separately included as a Tier 1 payment item. This measure calculates the number of inquiries that "time out." Such an event ceases the query function underway, thus requiring CLEC representatives to initiate it again. AT&T testified that some time-outs occurred after about 2.5 to 3 minutes of waiting.[120]

Qwest observed that AT&T considered the failure to raise this issue as an oversight. Qwest found that position hard to understand, because the PO-1A and B payment structure is based on intervals, while PO-1C is a percent measurement, which is structurally very different and therefore not compatible for payment purposes.

Discussion: The QPAP already provides for compensation for measures PO-1A and PO-1B, which measure response times.[121] There was a logical basis for excluding this percent measurement from the duration measurements that were included in Tier 1. We believe that the QPAP's treatment of the overall measurement (which includes 1A, 1B, and 1C) reflects a proper treatment of the issue of response times for the present. We also believe that incorporating sub-measure 1C would take more information and analysis than the current record supports. It would also raise the question of how total payments, which now consist of the combination of existing 1A and 1B combined payments, should be changed, if at all, to reflect the addition of 1C.

Given all the circumstances, we think it is reasonable to construe the PAP Collaborative agreement as intending not to include 1C separately; moreover, we find no reason to disturb that agreement as we have interpreted it. However, should the OSS testing now underway demonstrate a high enough number of timeouts to give concern about the impact on PO-1A and 1B response times, it would be appropriate to revisit the issue. This caution is offered in recognition that a high number of timeout cases (which have relatively much longer durations) could make response times under 1A and 1B look artificially good.

6. Adding Change Management Measures

Covad wanted to add change management performance measures to the QPAP.[122] Qwest had already agreed that it would add two change management measures, GA-7 (Timely

[119] Covad Initial PAP Brief at page 54.
[120] AT&T Initial PAP Brief at page 11.
[121] Exhibit S9-QWE-MGW-3.
[122] Covad Initial PAP Brief at page 49.

Outage Resolution) and PO-16 (Release Notifications). Those measures are now diagnostic, but would be included as "High" Tier 2 measurements after the ROC OSS collaborative establishes benchmark measures for them. [123]

Discussion: it is appropriate to include the measures as Qwest has proposed after benchmarks are established, given their importance and the region-wide nature of their operation and impact.

7. Adding a Software Release Quality Measure

WorldCom argued that the propriety of adding a proposed software Release Quality Measure should be reviewed at the QPAP's first 6-month review.[124] Qwest objected to the addition of a software-release quality measurement (GA-7), which the ROC OSS Steering Committee has recently rejected adding to the PID. Qwest also said that its testimony showed that the measure duplicated others, that it would tend to discourage ILECs from introducing software updates, and that such a measure is not included in any other BOC PAPs.[125]

Discussion: No participant sought the inclusion of the measure at this point. The request was only to address it under established QPAP review procedures. All of WorldCom's arguments in support of such a measure and all of Qwest's arguments against it can be raised in the context of the established procedures for addressing PID and QPAP changes. Should the ROC Steering Committee's recent decision remain binding and apt at that time, its reconfirmation will end the matter without material inconvenience or harm.

8. Adding a Test Bed Measurement

WorldCom asked that a Test Environment Responsiveness measure (included in its brief as proposed performance measure PO-19) be included in the QPAP payment structure after its adoption.[126] Qwest said that it is premature to discuss WorldCom's suggested test bed measurement because: [127]

- The test bed has only been in existence since August 1, 2001
- There have only been preliminary discussions about defining a performance measurement for it
- The FCC did not consider the Texas application defective for failing to include such a measure.

Qwest presented evidence that the proposed measure is being "vigorously disputed," and that Qwest's current proposal under discussion at the ROC OSS collaborative specifically provided that the measure would remain diagnostic until the 6-month review. Therefore, Qwest took exception to any suggestion that this measure could be considered to be close to resolution.

[123] Qwest Reply PAP Brief at page 31.
[124] WorldCom Initial PAP Brief at page 10.
[125] Qwest Reply PAP Brief at page 31.
[126] WorldCom Initial PAP Brief at page 11.
[127] Qwest Initial PAP Brief at page 50.

Discussion: We have no basis for predicting whether a measure will be approved, what its final content might be, whether it would lay a proper foundation for a QPAP payment, or what payment level might be appropriate. It is premature to express opinions about the future inclusion of a measure that is in this state of development. There should be no presumption for or against its eventual inclusion in the QPAP under the applicable procedures for modifying the plan.

9. Adding a Missing-Status-Notice Measure

WorldCom proposed adding to the QPAP payment structure a performance measure based on the missing status notice measure adopted in New York.[128] Qwest noted that neither WorldCom nor any other CLEC proposed this measure for inclusion during the PEPP collaborative. Moreover, the measure exists in the PID only in diagnostic form.[129] Qwest also noted that this measure (PO-10) has only been adopted in New York for a temporary period, and is scheduled for deletion by the end of this year.[130]

Discussion: No proper basis has been laid for establishing here a measure designed to respond and to respond only temporarily to circumstances existing in New York. Its inclusion may be requested later and in accordance with the applicable procedures for modifying the plan.

C. Aggregating the PO-1 A and PO-1B Performance Measures

Qwest said that the PEPP collaborative reached agreement on collapsing the seven individual measurements under PO-1A (response times for transactions under IMA-GUI) and PO-1B (response times for the same transaction types under EDI) into two that would be subject to QPAP compensation, by averaging the response times for all seven PO-1A measures and all seven (and identical) PO-1B measures. EDI and IMA-GUI are two different means by which CLECs can gain access to the OSS that manages the processing of CLEC orders and requests. AT&T argued at the QPAP hearings that the collapse intended was to aggregate each of the PO-1A measurements with their PO-1B counterparts, thus producing seven compensable QPAP measures.

Qwest said that its view is supported by agreement on the Qwest approach in Arizona, which it said came without objection by any participating CLEC there, and the inclusion of that same approach in the Colorado Special Master's Final Report, to which AT&T also did not object. Qwest also said that the agreement, which provides for escalation in payments as response times increase, is reasonable for these kinds of measurements.[131]

AT&T said that Qwest's interpretation of the agreement would allow Qwest to mask poor performance in certain transaction types.[132]

Discussion: Qwest will still be required to report performance under each of the seven transaction types and for each of PO-1A and PO-1B. The source of any deficient

[128] WorldCom Initial PAP Brief at page 11.
[129] Qwest Initial PAP Brief at page 51.
[130] Qwest Reply PAP Brief at page 31.
[131] Qwest Initial PAP Brief at page 45.
[132] AT&T Reply PAP Brief at page 21.

performance will be known with particularity. The real issue therefore is not about masking performance, but the reasonableness of combining the types of transactions into a single payment "opportunity." The seven transaction types involved are:

- Appointment scheduling
- Service availability information
- Facility availability
- Street address validation
- Customer service records
- Telephone number
- Loop qualification

The longest standard for any of them is 25 seconds; the shortest is 10 seconds.[133] The QPAP calls for maximum payments of $210,000 per month per measure; under Qwest's two collapsed measures the total monthly exposure would therefore be $420,000. AT&T's approach would produce a maximum monthly exposure of $1,470,000. The recommended AT&T exposure appears to be out of balance with the Tier 2 payment amounts for other failings (e.g., how long the electronic gateways are out of service, which can mean no transactions at all, not just responses delayed by seconds). The AT&T approach would also have the greater tendency to mix unrelated performance types. It would average response times produced through two different systems. For each system, what is at issue are small response-time variances; the maximum penalty is reached after a delay of 10 seconds. These two systems are likely to produce delays for largely independent reasons.

The evidence shows that the agreement reached was on the terms represented by Qwest; moreover, those terms establish significant and more balanced payment responsibilities for failure to meet standards.

D. Measure Weighting

1. Changing Measure Weights

Some CLECs requested that the weighting (and therefore the QPAP payment amounts) be increased for certain high capacity loop (DS1 and DS3) measures. Qwest agreed to do so, but it then dropped the weighting and corresponding payment amounts for other services, such as residence resale, to compensate. AT&T argued that it was appropriate to increase the high capacity measures, but not to decrease any others in response.[134]

Qwest said that it could accept the AT&T approach of applying different payment structures to what AT&T called high value services (in which AT&T included collocation, LIS trunks, unbundled dedicated interoffice transport, unbundled loops, and resold DS-1 and DS-3 services), but only if PAP payments would remain in reasonable

[133] Exhibit S9-QWE-MGW-3.
[134] AT&T Initial PAP Brief at page 25; ELI/Time Warner/XO Utah Initial PAP Brief at page15.

proportion to the monthly rates that Qwest charges for those services. Qwest also specifically objected to including 4-wire unbundled loops in the high value category.[135] Qwest's reply brief stated that no CLEC had taken issue with the proportionality analysis set forth by its witness in Exhibit S9-QWE-CTE-5, Slides 11 and 13.[136]

AT&T said that Qwest's response to AT&T's request to increase the weighting on certain services was inappropriate. AT&T said that the reduced weighting on residence resale, unbundled 2-wire loops, unbundled analog loops, and business resale represented high volume CLEC services, while the services whose weight was increased were low volume. Therefore, according to AT&T, Qwest's proposal would significantly drop its overall payments under the PAP.

Discussion: Conceptually, there was no error in Qwest's efforts to rebalance payments among measures as a way of responding to AT&T's request for a higher weighting on certain services of value to AT&T. Qwest's proportionality analysis was also an appropriate overall gauge for comparing the financial consequences associated with different measures. The issue of financial exposure here is not merely one of what a total cap might be, but also one of how fast one progresses to that cap and how likely it is that the cap will be reached. Obviously, moving measures to a higher weighting will cause a faster progression to the cap and it will increase the chances that it will be met.

One source of disagreement is the AT&T belief that Qwest overcompensated. However, a number of CLECs go further. They at least implicitly argue that there is no reason not to increase the net rate of progression toward the cap, but we will defer resolution of that issue until later, in the *6-Month Plan Review Limitations* section of this report. As to the overcompensation issue, AT&T, which requested the change in the first place, failed to propose any better alternative. Therefore, given its opposition to what Qwest did to meet AT&T's stated needs and given a concern that Qwest may have overcompensated (and perhaps even to the detriment of CLECs other than AT&T, for whose benefit Qwest made this change), the best course is not to make either the weighting increases or the weighting decreases that Qwest offered to address AT&T's concern.

The QPAP before Qwest agreed to change certain weights was reasonable. It was also reasonable for Qwest to ask, in return for changing some payment amounts upward, for compensating reductions in others. It would be fair to give CLECs a choice between the two, but it would be imbalanced to allow them to take the benefit of Qwest's offer, while denying the compensating benefit sought by Qwest to keep payments in balance. Qwest's proportionality analysis buttresses this conclusion. As a principal supporter of changed weights, AT&T found Qwest's change in to be imbalanced. No other reasonable proposal being made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed in these proceedings.

2. Eliminating the Low Weighting

ELI/Time Warner/XO Utah argued that no measure should have a low weight, all should be at least a medium, and some should move from medium to high. Covad also said that

[135] Qwest Initial PAP Brief at page 35.
[136] Qwest Reply PAP Brief at page 24.

no measures should be considered low. Z-Tel suggested averaging the low and medium payment amounts to reduce the weights from three classes to two classes. [137]

Qwest argued that CLECs presented no evidence to support a change in measurement weighting for PAP purposes. Qwest said that these changes would not improve the PAP, but would merely provide increased payments to CLECs.[138]

Discussion: Little support was provided for these requested changes. Certainly, no case was made that the QPAP may be found inadequate for failing to incorporate them. Finally, some of them suffer from the same balance problem that we addressed in the immediately preceding section of this report. All CLECs might agree on increasing the payments associated with all measures. But upon imposing what we feel is a proper balancing requirement, that consensus would likely disappear as parties began to focus on making their particular needs "winners" in the process, while seeking not to suffer any "losers" of importance to their operations. We believe that the three categories of weights that came out of the PEPP collaborative process should remain.

3. LIS Trunks Weighting

AT&T said that LIS trunks should be considered as particularly high value services, which therefore should carry higher non-performance payments. AT&T said that it could not sign up new customers where Qwest failed to deliver LIS Trunks. [139] ELI/Time Warner/XO also considered LIS Trunks to be of high value.[140]

Qwest said that the argument that CLECs are "out of business" without LIS trunks is applicable only to the first LIS trunk order, which is not the common order. The much more typical order is for added trunks, where, Qwest argued, the trunk blocking measure, N-1, would already provide payments in cases where Qwest cannot provision incremental trunks on time.[141]

Discussion: From a broad perspective, it is a significant overstatement to say that LIS trunks are of particularly high value because CLECs are "out of business" if Qwest fails to deliver them. Qwest correctly notes that trunk blocking, as opposed to an inability to take on new customers is the more common issue. In that regard, orders for incremental LIS trunks are not categorically different from other services that Qwest may be slow to deliver. In fact, a review of the CLEC testimony makes it appear as if what LIS Trunks mean to AT&T and ELI/Time Warner/XO Utah, high capacity loops or line sharing mean to others. The QPAP needs to address value in a more balanced way, because taking each CLEC's claim of particular importance at face value would inevitably make all measures of high weight. We continue to believe that the QPAP payment structure already reflects an adequate treatment of measure weights. No change is recommended here.

[137] ELI/Time Warner/XO Utah Initial PAP Brief at page 18. Covad Initial PAP Brief at page 34, Z-Tel Initial PAP Brief at page 34.
[138] Qwest Initial PAP Brief at page 27.
[139] AT&T Initial PAP Brief at page 25.
[140] ELI/Time Warner/XO Utah Initial PAP Brief at page 17.
[141] Qwest Reply PAP Brief at page 25.

E. Collocation

The New Mexico Advocacy Staff proposed either the Michigan or the Georgia approach to determining collocation payment amounts.[142] Qwest commented that the CLECs represented during a May PEPP collaborative workshop that their proposal did reflect the Michigan approach. Qwest later accepted that proposal. No CLEC has argued in its briefs that Qwest's acceptance of the cited proposal is in any way inadequate.

Discussion: The evidence presented by Qwest demonstrated that the collocation proposal whose acceptance it acknowledged at the hearings was both based on the Michigan proposal and acceptable to the CLECs who responded to it. No objection was made to the proposal by any CLEC brief. The incorporation of the proposal already agreed to by Qwest appears to respond to the request of the staff and is in any case reasonable. There is no reason to question the QPAP's treatment of collocation payments.

We recommend that a provision be included in the QPAP that explicitly states that a CLEC's general opting into the QPAP does not override their rights in Utah with respect to collocation intervals.

F. Including Special Access Circuits

WorldCom requested that special access circuits be included in the PID performance measures as one of the product disaggregations, and that the QPAP be changed to provide for payments associated with such circuits.[143] ELI/Time Warner/XO Utah also considered it important to include payments for special access circuits, in order to provide proper incentives for Qwest to support this important means by which some CLECs provide local exchange service.[144] ELI/Time Warner/XO Utah said that Qwest did not dispute the evidence that comprises the key factual support for its position – evidence that:[145]

- Special access circuits are a widespread means of providing local exchange service
- It is impracticable to procure UNEs, such as EELs, as an alternative means of providing local exchange service
- There will be post-271 approval problems with the service that Qwest provides through special access circuits.

Qwest said that there had been agreement to drop special access circuits from discussions by the ROC OSS collaborative that designed the PID, because section 251 did not include them. Qwest also said that special access circuits cannot be considered a checklist item at all, according to the FCC and a number of state commissions. Qwest also cited the FCC's current consideration of the complex issues involved in extending unbundling obligations to special access circuits. Qwest cited the Colorado Special Master's Report

[142] New Mexico Advocacy Staff Initial PAP Brief at page 25.
[143] WorldCom Initial PAP Brief at pages 18 and 19.
[144] ELI/Time Warner/XO Utah Initial PAP Brief at page 6.
[145] ELI/Time Warner/XO Utah Reply PAP Brief at page 2.

as supporting the exclusion of special access from PAP or other section 271 consideration. Qwest also objected to the notion that other states had acted substantively on the question of special access circuits. Qwest said, for example, that there is no authority for concluding that the Minnesota Commission has in fact adopted special access service standards.[146] Qwest also cited a recent Indiana Utility Regulatory Commission as denying a CLEC request to include performance metrics and penalties for special access circuits in proceedings addressing Indiana Bell (SBC-Ameritech) compliance with section 271(c). Qwest cited that decision's review of other state decisions, none of which, according to the Indiana commission, supports inclusion of special access circuits in an examination under section 271.[147]

Qwest also responded to the claim of ELI/Time Warner/XO Utah that Qwest failed to contest the factual issues surrounding special access.[148] Qwest cited testimony from its witnesses stating that virtually all special access circuits had been purchased out of interstate tariffs.[149]

ELI/Time Warner/XO Utah argued that nothing that the FCC has said in prior contexts, focusing on the Verizon (Bell Atlantic – New York) 271 order, should be read as contrary to its request here. These participants said the ruling in the New York 271 order provided that special access circuits should not be considered in the context of a 271 review. The issue here is different to them; it is adopting a QPAP payment structure. These participants said that the structure needs to include special access circuits, in order to assure that the PAP gives meaning to Qwest parity obligations, by encouraging adequate provisioning and repair of high-capacity Qwest facilities that serve CLECs. ELI/Time Warner/XO Utah said that the FCC has not precluded PAP treatment of special access circuits in any prior decision, and that a number of states are now expressing concern about the issue of poor special-access-circuit service, and are considering remedies.[150]

Discussion: We have spent considerable time examining CLEC use of special access circuits to provide local exchange service. The August 20, 2001 *Unbundled Network Elements Report* in these workshops described the contest over the relevant facts and the standards under which those facts should be considered. We conclude that special access circuits do not merit the treatment recommended by a number of CLECs. The evidence of record supports the conclusion that the overwhelming majority of special access circuits at issue here were purchased under federal tariffs. Remedies for failure to meet the requirements of that tariff should be addressed by the agency with jurisdiction under such tariffs; i.e., the FCC, not state public service commissions. Similarly, the QPAP need not address failures to meet existing state tariffs; CLECs can appeal directly to state commissions for any necessary relief.

The only apparent reason for overriding the sound principle of letting the FCC and the state commissions police their own tariffs would be if there existed some inappropriate barrier that had the practical effect of requiring tariff purchases where interconnection agreement purchases should have been available. That issue was addressed in the prior

[146] Qwest Initial PAP Brief at page 54.
[147] Qwest Reply PAP Brief at page 33.
[148] ELI/Time Warner/XO Utah Initial PAP Brief at page 9.
[149] Qwest Reply PAP Brief at page 34.
[150] ELI/Time Warner/XO Utah Reply PAP Brief at page 4.

workshops, where some of the same CLECs arguing this issue here disputed the propriety of Qwest's historical limitations on allowing access to EELs as UNEs. The August 20, 2001 report substantially eased restrictions on the conversion of special access circuits to EELs,[151] which makes it possible for CLECs to bring services under the terms and conditions of an interconnection agreement or an SGAT, should they elect to do so. In that case, CLECs would have all the rights and expectations applicable under such agreements, rather than, as they would effectively do here, mixing tariff and agreement and federal and state jurisdictional purchase rights and remedies.

G. Proper Measure of UNE Intervals

Covad argued that QPAP payments should be based on the intervals of SGAT Exhibit C, rather than on the intervals set forth in the PID. [152] Qwest responded that there is a logical relationship between SGAT Exhibit C and the PID performance measures.[153]

Discussion: This issue is similar to the one addressed as the first unresolved *Loops* issue (*Standard Loop Provisioning Intervals*) in the August 20, 2001 *Unbundled Network Elements Report* in these workshops. There is, as was discussed there, consistency between PID performance measure OP-3 (percent of installations completed on or before the due date) and PID performance measure OP-4 (number of days to complete installations), and SGAT Exhibit C (Qwest's Standard Interval Guide). For the reasons expressed in the August 20, 2001 report, it is appropriate for the QPAP to apply the PID performance measures, not SGAT Exhibit C, as the payment standard.

H. Low Volume CLECs

Covad argued that Qwest designed the QPAP primarily to compensate high-volume CLECs, with the result that lower volume CLECs, such as itself, will be under-compensated.[154] Qwest argued that the evidence refutes any claim that the QPAP's reliance upon a per-occurrence compensation structure would disadvantage CLECs with small wholesale-service volumes. Qwest presented evidence showing that a number of smaller CLECs, including Covad, would for the period from February through March of 2001 have received payments much larger than CLECs of greater size. At the same time, some of the largest CLECs would have received disproportionately small payments.[155]

Covad also objected, more particularly, to the QPAP provision that it said would provide Qwest with one free miss each month in the case of CLECs with small order volumes. In order to compensate for that phenomenon, Covad recommended setting minimum payments at five times the baseline amount for CLECs subjected to the free miss standard.[156]

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[151] See for example the proposed resolution of the third disputed *EELs* issue (*Waiver of Termination Liability Assessments for EELs*) from the August 20, 2001 *Unbundled Network Elements Report*.
[152] Covad Initial PAP Brief at page 23.
[153] Qwest Reply PAP Brief at page 40.
[154] Covad Initial PAP Brief at page 27.
[155] Qwest Initial PAP Brief at page 30.
[156] Covad Initial PAP Brief at page 33.

Qwest objected to Covad's characterization of this aspect of the QPAP. Qwest defended this provision as a necessary adjustment to provisions that would make its performance standard one of perfection in the case of very small order volumes, because even one miss would put Qwest below the required level of performance. For example, for order volumes of five, the best Qwest could do, unless it were perfect, would be to reach 80%, i.e., four out of five. Qwest said its analysis of the February to May 2001 period showed that the so-called "one-miss" standard would only have come into play 8% of the time, which falls far short of justifying minimum payments 100% of the time.[157]

Discussion: As a general matter, Qwest provided substantial evidence that the QPAP would not serve to under-compensate smaller volume CLECs. Qwest's evidence, which was credible and which was not rebutted by CLEC evidence to the contrary, demonstrated that, for the sample period of February through May of 2001, it could not be demonstrated that there was any disturbing correlation between QPAP payment levels and CLEC order volumes, thus disproving the claim that would be relative under compensation to those with lower order volumes.

Turning to the "free miss" issue, as parties termed it, the goal of excluding one miss from compensation was to prevent (in the case measurements with CLEC volumes of 5 or fewer) turning a 90% benchmark into a 100% one.[158] Qwest's illustration calls to mind the way that the Sun illuminates the Moon: it can get only half the job done at a time. The occult side of Qwest's point about the problem of rounding "up" is that rounding "down" turns a 90% standard to an 80% one. A rolling average applied yearly would serve much better to correct the problem of rounding. It would not, however, alone solve the issue of escalating payments for consecutive-month misses. That problem can be solved by providing that the escalation provision will be applicable in any month where any miss occurred for CLECs with order volumes at the level in question, and where the annual calculation shows violation of the applicable requirement. The SGAT should incorporate these changes.

VI. Structure to Detect and Sanction Poor Performance as It Occurs

A. 6-Month Plan Review Limitations

Section 16 of the QPAP provides the means for amending the plan. This section allows for the following changes:

- Addition, deletion, or change of measurements (based on whether there was an omission or failure to capture intended performance)
- Change of benchmark standards to parity standards (based on whether there was an omission or failure to capture intended performance)
- Changes in weighting of measurements (based on whether the volume of "data points" was different from what was expected)

[157] Qwest Initial PAP Brief at page 33.
[158] Qwest Reply PAP Brief at page 21.

- Movement of a measure from Tier 1 to Tier 2 (based on whether the volume of "data points" was different from what was expected).

The section requires any change to the QPAP to be approved by Qwest.

AT&T noted that the New York and the Texas plans allow any aspect thereof to be examined at the six-month reviews. AT&T urged this approach, in order to allow for a consideration of the public interest. Specifically, AT&T would make all plan aspects open to review, and would rest authority for deciding to accept any changes with the state public service commissions. AT&T would also eliminate the number of data points as the sole basis for determining performance measure reclassifications.[159] AT&T would also take away Qwest veto power over QPAP changes, and allow more extensive PID review.[160]

ELI/Time Warner/XO Utah proposed that the QPAP be treated like any other SGAT or interconnection agreement provision in terms of its amendment.[161] WorldCom objected to the failure of the QPAP to permit state commissions to amend the substance of the plan and to the veto power that Qwest has under the QPAP.[162] Covad said that the plan-review provisions of the QPAP were neither appropriate nor what has been included by other BOCs.[163]

Qwest objected to an obligation to open the QPAP generally to amendment, because of its need to have certainty about the extent of the obligations it was agreeing to undertake. Qwest also said that effective administration of the plan required a substantial degree of stability in its provisions. Qwest said that the QPAP limits on the scope of the 6-month reviews reflect the same provisions included in the Texas, Kansas, and Oklahoma PAPs existing as of FCC 271 application decisions there.

Discussion: The Texas PAP is in almost all respects consistent with what Qwest has proposed. The four types of permissible changes are the same. The requirement that the BOC agree to changes in existing performance measures is also the same. One material difference is that questions related to the addition of new measures may be resolved by arbitration. The Colorado Special Master's Report sets forth similar constraints on revising the PAP under the six-month review process. Specifically, it would:

- Prohibit revisiting the statistical methods applicable to parity determinations
- Prohibit revisiting the payment structure and the categorization of payments by tiers
- Prohibit revisiting the methods for capping payments
- Allow measures to be added or deleted
- Allow shifts in the weighting given to existing measures.

[159] AT&T Initial PAP Brief at page 14.
[160] AT&T Initial PAP Brief at page 14.
[161] ELI/Time Warner/XO Utah Initial PAP Brief at page 27.
[162] WorldCom Initial PAP Brief at page 9.
[163] Covad Initial PAP Brief at page 37.

The Colorado Special Master's Report would grant state public service commissions authority to decide on the propriety of any identified changes, which the commissions would then ask Qwest to include in an amended SGAT filing. That report also recommends a separate review process (assisted by an outside expert under funding provided through Tier II payments), which would take place after three years of PAP operation, and which could examine broader changes to the PAP. That process would address:

- An assessment of the effectiveness of the PAP
- Revisions to PAP payment amounts (based solely upon evidence of harm produced by particular wholesale performance deficiencies)
- Removal of measures from the payment structure (based on the degree to which commercial alternatives to the use of Qwest services have become available or on a demonstration that Qwest can deliver reliable wholesale performance)
- Deletion of measures no longer needed to be measured or subjected to payments
- Whether the six-month interval for routine consideration of changes remains appropriate.

There are two basic economic issues that appear to concern Qwest when it comes to QPAP changes; i.e., the matters of payment ceiling and payment trajectory. We have already addressed the question of the ceiling in the discussion of the *Total Payment Liability* section of this report. We see no reason here to change the recommendation that total financial liability remain predictable. The question of trajectory; i.e., how fast payments move toward the ceiling, we began to address earlier in the *Measure Weighting* section of this report. The kinds of changes to the performance measures that are in dispute would clearly affect that trajectory; providing a too liberal mechanism for changing them would be problematic. Qwest would solve that problem by requiring its agreement to all changes. In contrast, the Texas plan would use arbitration in a limited number of cases. The Texas plan's approach is more appropriate to addressing the need for and financial consequences of new performance measures that meet the QPAP's standard, which here is whether there was an omission or failure to capture intended performance.

The market of concern is young and in many cases yet to be tested by substantial experience under new ways of doing business. We should also recall that the performance measures at issue came from a process conducted under the auspices of the ROC. It is reasonable to anticipate the possibility of substantial need for new measures if we are to assure that the QPAP will continue to detect and sanction poor performance as it occurs. Because we are uncertain of the continued role of the ROC in performance measure development and administration, the Texas arbitration provision is therefore appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure.

The Colorado Special Master's Report made several creative suggestions that may provide for an effective alternative. In particular, the establishment of a mechanism for dispute resolution and PAP administration, funded through Tier 2 payments may prove quite effective and efficient when applied in a multi-state context that includes a large

number of states with significant resource limitations. We have discussed that concept in the *Tier 2 Payment Use* section of this report.

The three-year PAP review process recommended in the Colorado Special Master's Report would also serve a useful purpose in examining the continuing effectiveness of the QPAP as a means of inducing compliant performance without applying payment requirements that experience may prove excessive or unnecessary. That process should also be adopted, with the understanding that its results would not be intended to open the QPAP generally to amendment, but would serve to assist the commissions in generally determining then existing conditions and reporting to the FCC on the continuing adequacy of the QPAP to serve its intended functions.

In summary, we believe that the QPAP is not fundamentally different from either the Texas plan or the Colorado Special Master's Report in the matter of changing the plan. With the following changes, we believe that the present QPAP provisions can function effectively to respond to external changes, without creating insufficiently defined financial exposure to Qwest. Those changes are:

- Provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding proposed addition of new measures to the QPAP payment structure
- Recognize and support multi-state efforts (should they occur) to create a Tier 2 funded method and a regular administrative structure for resolving QPAP disputes
- Provide for biennial reviews of the QPAP's continuing effectiveness for the purpose of allowing state commissions to regularly report to the FCC on the degree to there are adequate assurances that Qwest's local exchange markets remain and can be expected to continue to remain open.
- In all events, the Utah Public Service Commission will be the ultimate decision maker in the decision making process to proposed QPAP changes.

B. Monthly Payment Caps

Several CLECs expressed concern over the QPAP Section 13.9 provision that allows Qwest to place Tier 1 payments that exceed a monthly cap into escrow, and to ask for relief from the obligation to pay such amounts.[164]

Discussion: In the *Procedural Caps* section earlier in this report, we recommended that a monthly cap be used, and a debt instrument be used by Qwest to the CLEC involved and to the State of Utah for Tier 2 payments in excess of the cap. We agree that an escrow account may be used, but Qwest must continue to pay interest until all debts are paid in full.

[164] AT&T Initial PAP Brief at page 20; ELI/Time Warner/XO Utah Initial PAP Brief at page 24.

C. Sticky Duration

Z-Tel stated that the best evidence of the sufficiency of payments to provide an incentive to Qwest would be actual performance under the QPAP.[165] It therefore proposed that base payment levels escalate if Qwest, after suffering an initial episode of non-compliance, should suffer a second or third episode of similar magnitude. For example, if the first episode was of two months duration (i.e., produced an obligation to make base payments escalated once for the second month) and the second was of two months duration (or greater presumably) at the end of the second episode, payments would not drop back to the base level after a following month of compliant performance. Instead they would remain at the higher two-month level as a new base for the next six months, presumably escalating from that higher level for consecutive month misses during that period. If there were to be a third two-consecutive-month miss period, then the two-month payment level would be the minimum on a permanent basis.[166]

Qwest first argued that the QPAP already contained measures that would, unlike the Texas plan, keep payments for long-term problems from dropping to initial levels based on merely one month of acceptable performance. As payments step up gradually over time, so would they step down only gradually after performance improved.[167]

Qwest argued that permanently freezing base payments at an escalated level would be inappropriate. Such a provision would create an improper presumption about the speed with which Qwest should be able to identify and correct performance problems. Qwest specifically cited the lag in producing performance results reports, which would mean that a problem could well exist for nearly two months before those reports even disclosed its existence.[168] Qwest noted that, once the payment levels stick permanently at a higher amount, Qwest could do nothing to cause the levels ever to drop, no matter how long it might provide compliant performance after correcting whatever problem caused the non-compliance.[169]

Discussion: The Z-Tel proposal is inappropriate. It purports to spring from the premise that the best test of the sufficiency of a payment structure is Qwest's performance while operating under it. Then it proceeds to add penalties for multiple failures by Qwest no matter how far apart in time they occur. It is disingenuous because it would ignore entirely successful performance by Qwest however long Qwest provided it. The proposal is draconian because its new baseline payment levels, when multiplied by the still applicable escalation levels, could produce payments by Qwest that are an order of magnitude higher than those contemplated by the QPAP before Z-Tel's amendment. We have already addressed the fallacy in Z-Tel's argument that there should be no reasonable limit to Qwest's financial exposure under the QPAP. This proposal suffers from that same flaw.

[165] Z-Tel Initial PAP Brief at page 20.
[166] Exhibit S10-ZTL-GSF-1 at page 14.
[167] Qwest Initial PAP Brief at page 22.
[168] Qwest Initial PAP Brief at page 23.
[169] Qwest Reply PAP Brief at page 17.

D. Low Volume Critical Values

The QPAP reflects a statistical approach that came from partial agreement at the PEPP collaborative. That agreement was to alter the default critical value from 1.65 to 1.04 for a number of small-volume measures, and to increase it to varying levels above 1.65 for progressively larger volume measures. Z-Tel and WorldCom argued at the QPAP workshop that the lower value of 1.04 should apply to all low volume measures, not just to the subset of them to which the QPAP would subject to the 1.04 value.[170]

Qwest objected to this proposal for being:[171]

- Out of step with what was agreed to by it, commission staffs, and the other CLECs at the PEPP collaborative
- Out of balance in terms of the numbers of measures to which it would apply.

Qwest said that the PEPP collaborative reached a statistical-methods agreement (which did not include Z-Tel) that was designed to balance the impact of the changes that benefited each side. According to Qwest, a key aspect of that agreement was that the parity measures subject to statistical testing would involve CLEC volumes of less than ten over 60 percent of the time. The agreement to use the 1.04 critical value (in lieu of the 1.65 value) only for certain measures would apply the lower value to the benefit of CLECs in the case of 1,519 measures.[172] In return, values higher than 1.65 would be applied to the benefit of Qwest in 1,917, or roughly the same number of parity measures.

Qwest said that the Z-Tel proposal would destroy this balance by applying the lower 1.04 value to over 10,000 tests, not the 1,519 contemplated by the agreement reached at the PEPP collaborative, leaving the number to which the higher value would be applied at 1,917. Qwest also noted that the FCC has already considered and rejected a similar CLEC argument in the Verizon New York application.[173] Qwest also said that the New Mexico Advocacy Staff has not provided any reason to support the reversal of its position on applying the 1.04 value, citing the staff's agreement to its limited application in the PEPP collaborative.[174]

Discussion: The need to reach some compromise in this case appears not to arise from a dispute about statistical theory per se, but rather about what to do in cases where statistical theory may fail those who must deal with practical realities. As Z-Tel noted in its comments, certain statistical errors occur when statistical techniques are applied to small sample sizes. These are not errors in the data, but errors in what the application of statistical techniques indicates that we should conclude from the data. The use of the alternate 1.04 (versus 1.65) value does not even eliminate those errors; as Z-Tel said in its comments, it merely provides a "rough approximation" of some (at least to us) elusive mathematical truth.[175]

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[170] Z-Tel Initial PAP Brief at page 23.
[171] Qwest Initial PAP Brief at page 41.
[172] LIS Trunks and undbundled dedicated interoffice transport, resale, and unbundled loops for DS-1 and DS-3.
[173] Qwest Initial PAP Brief at pages 41 and 42, citing paragraph 17 of the Bell Atlantic New York Order.
[174] Qwest Reply PAP Brief at page 29.
[175] Exhibit S10-ZTL-GSF-1 at page 12.

No participant disputed the fact that those participants who did agree to the modified statistical approach at the PEPP collaborative did so in major part to balance out, in terms of numbers of measures, cases where the value to be used increased from 1.65 with cases where the value to be used was reduced from 1.65. In other words, what Z-Tel and a number of others (including some who apparently were in accord with the agreement reached at the PEPP collaborative) appear to want to do now is to apply theory to adjust a decision reached through compromise. That is not fair. We would have to begin without the compromise solution if we are to resolve this through debates about the relative superiority of competing theories. Nobody argued in reply briefs that Qwest misread the FCC decision with respect to the application of statistical methods in prior cases. We see no reason to upset the balanced, compromise approach that met with substantial agreement at the PEPP collaborative.

E. Applying the 1.04 Critical Value to 4-Wire Loops

The Q-PAP excludes 4-wire loops from the 1.04 critical value compromise, but it includes DS-1 loops. AT&T said that it is disingenuous to concede, as Qwest has, that DS-1 and 4-wire loops are analogous for setting provisioning intervals, but not for establishing QPAP payment amounts. AT&T said that it always understood the agreement reached at the PEPP collaborative to include 4-wire loops. AT&T also said that its proposal would not be difficult to administer, because AT&T would simply have it applied to all 4-wire loops, thus obviating any need to determine whether those loops were being used at the DS-1 level.

Qwest objected to AT&T's request to include 4-wire loops under those measures subject to the 1.04 critical value agreement.[176] Qwest said that 4-wire loops:

- Were clearly excluded from that agreement
- Were considered analogous to DS-1 loops (which are included in the agreement) only for the purpose of measuring intervals, not the value of the underlying service
- Are not always used at the DS-1 level, and are only so used when CLECs add electronics, a fact which Qwest neither controls nor about which Qwest even has knowledge

Discussion: The evidence shows that the agreement made was to apply the 1.04 critical value to various types of high-value services. Four-wire loops could be used at DS-1 levels or they could not. Whether or not DS-1 loops are or are not the correct analog for 4-wire loops with respect to provisioning intervals does not have a self-evident connection with the reason why special groupings were established for purposes of applying the 1.04 critical value. What is relevant are the answers to the two following questions: (a) is there a feasible way to include 4-wire loops that are used at the DS-1 level into the identified group, which would make it logical to conclude that such loops were intended to be included under the agreement to be reached, and (b) if not, whether there is a sound reason for including them anyway.

[176] Qwest Initial PAP Brief at page 44.

The answer to the first question is that, unlike loops provisioned by Qwest with the capability to provide DS-1 services, 4-wire loops take after-the-fact action by CLECs to make them DS-1 capable. Qwest has neither knowledge nor control over those actions; therefore, the only way feasibly to include them would be to assume that all (or the overwhelming majority at least) of the 4-wire loops are made DS-1 capable by CLEC additions of electronics to them. This assumption has not been supported by evidence; therefore, we should not make it. The agreement made should be read as excluding 4-wire loops, particularly since the participants were knowledgeable enough of the capabilities issue to have addressed it had they wished to do so.

As to the second question, no sound reason for adding 4-wire loops has yet been shown to exist. Increasing payment levels to CLECs is not per se a sound reason. Their addition would either impose undue PAP administration requirements or require an unsound assumption that all 4-wire loops are DS-1 loops.

We should underscore that this conclusion is based upon the lack of evidence from AT&T to show that there is a very high rate of use of 4-wire loops for delivering high value services. Should there later be clear and convincing evidence during application of the QPAP's amendment procedures that such use is made of 4-wire loops in excess of 75 percent of such loops leased as UNEs, the issue should be reconsidered during the application of the QPAP's amendment procedures.

F. Measures Related to Low Volume, Developing Markets

Section 10.0 of The QPAP has been designed to provide a minimum level of compensation in developing markets. The section provides for minimum payments of at least $5,000 per month for non-compliant service in cases where aggregate CLEC volumes are between 11 and 99.[177]

Z-Tel proposed to replace the $5,000 aggregate payment to all CLECs with a minimum payment of $1,000 to individual CLECs for individual measures.[178] Covad also recommended individual, rather than aggregated, payments, and questioned why only a limited number of xDSL services had been included in QPAP Section 10.[179] Covad argued that all xDSL products can be considered to be low volume by comparison with POTS/voice-grade lines, thus making the inclusion of all xDSL sub-measures self evidently appropriate. Qwest objected to the Covad and Z-Tel proposal to apply the higher payments to individual CLEC volumes that fall within these limits, regardless of what aggregate CLEC volumes under the measures may be.

Qwest said that, for the February through March 2001 time frame, individual CLEC volumes for the OP and MR performance measurements were less than the 100-occurrence limit. Applying the Covad/Z-Tel proposal on such a widespread basis would change it from a market-development inducement to a preference for CLECs with small volumes operating even in mature markets.[180] Qwest also responded to the Covad recommendation to add other xDSL products. Qwest said that they are included in other

[177] Qwest Initial PAP Brief at page 29.
[178] Z-Tel Initial PAP Brief at pages 25 through 27.
[179] Covad Initial PAP Brief at pages 34 through 37.
[180] Qwest Initial PAP Brief at page 29.

parts of the QPAP, and that there are many services that CLECs could purchase for use in providing their end users with xDSL services without Qwest's knowing about it. Therefore, according to Qwest, it would take extraordinarily broad categories of unbundled loops to encompass all that could be used in providing nascent services.[181]

Discussion: The Z-Tel and Covad proposals would serve to change the nature of QPAP Section 10. Aggregating CLEC volumes keeps the provision focused on developing markets. Making minimum payments to individual CLECs based on their individual order volumes would extend its applicability to small CLECs operating in very well developed markets. We address this latter issue in the following *Minimum Payments* section of this report. We conclude here that Qwest's design for Section 10 is an appropriate method for providing Qwest with an added incentive to perform in developing markets. We also conclude that Qwest's designation of DSL products covered is adequate for the purposes of the section.

G. Minimum Payments

WorldCom commented that small order counts would not produce significant payments by Qwest. WorldCom therefore recommended a $2,500 per occurrence minimum payment, with escalation based on these minimums.[182] Qwest objected to WorldCom's minimum payment proposal as not relating to small CLECs, on grounds that it would apply regardless of CLEC size or order volumes. Qwest also objected to the resulting application of the QPAP's escalation provisions to the minimum payment amounts. Qwest cited as an example the fact that WorldCom's proposal could produce a $2,500 payment for late installation of a service selling for $20 per month.[183]

WorldCom agreed that it would be appropriate to limit its proposed minimum payments to CLECs with monthly volumes of less than 100 occurrences. WorldCom continued, however, to support a minimum payment amount of $2,500 per occurrence, arguing that Qwest's apportionment of $5,000 among all qualifying CLECs and its limitations on the sub-measures qualifying for minimum payments would provide insufficient incentive to Qwest to respond to underlying problems.[184]

Discussion: The issues of minimum payments and payments for developing markets are distinct. The latter should apply on the basis of combined CLEC orders; the former, if appropriate at all, should be a function of the quantity of an individual CLEC's orders. Should the latter be appropriate, it would be because CLECs with very small order numbers suffer harm out of proportion to the number of their orders. There is logic in that theory; it takes a relatively small number of instances of noncompliance to affect a very large portion of a small CLECs business operations. Thus, their ability even to stay in business in Qwest's region can be more severely threatened by smaller numbers of noncompliant performance instances. However, compensating for that risk on a monthly basis and applying escalated payments to a higher base level of compensation are not rationally related to this risk factor. Thus, it would be appropriate to set an annual

[181] Qwest Reply PAP Brief at page 23.
[182] Exhibit S9-WCM-CEW-1, at pages 34 and 35.
[183] Qwest Initial PAP Brief at page 34.
[184] WorldCom Reply PAP Brief at page 3.

minimum payment that is a function of the number of months in which Qwest fails to meet performance standards.

Applying WorldCom's revised 100 orders per month would produce a ceiling of 1,200 orders per year, above which minimum payment provisions should not apply. A minimum payment of $2,000 is more appropriate, and should be applied per month for each month in which Qwest missed any measure applicable to such CLECs. The minimum payment should not be applied on a per measure basis. The minimum payment should also account for months in which volumes were more substantial, in order to assure that order placement is not influenced by month-end considerations. All QPAP payments to such CLECS for that month should count against that minimum. The QPAP should therefore provide as follows:

> *For each CLEC with annual order volumes of no more than 1,200, Qwest shall perform at the end of each year a minimum payment calculation. Qwest shall multiply the number of months in which at least one payment would be required to such CLEC by $2,000. To the extent that actual CLEC payments for the year are less than the product of the preceding calculation, Qwest shall make annual payments equal to the difference.*

Thus, for example, if the total amount due to a qualifying CLEC before the application of this provision, counting escalation, were $5,000, and if there were 9 months in which Qwest failed to meet a Tier 1 compensable standard for that CLEC, the additional amount that Qwest would pay to such CLEC at the end of the year (with other payments due for service during the month of December) would be 9 x $2,000 -$5,000 = $13,000. This approach also responds to the Qwest concern about the multiplying effect of escalation on minimum payments.

H. 100% Caps for Interval Measures

The QPAP contains a number of provisions that are intended to provide payments on the basis of the number of occurrences that fail to meet standards. A measure that provides an overall average quantification of the degree to which Qwest misses a standard can cause misleading results when it is applied to a per-occurrence payment structure. For example, a 3-day actual average interval for 100 events that are subject to a 2-day interval would produce a miss of 150%.[185] If the per-occurrence penalty were applied to this result, Qwest argues that it would produce payments for more occurrences than actually took place.[186]

Qwest also said that similar limiters exist in other PAPs:[187]

- 100% limiter added to the Texas PAP after 271 approval and at the first six-month review of that plan
- 100% limiter in the Oklahoma PAP in the Oklahoma 271 application as approved by the FCC

[185] The formula looks like this: 100 events times 3/2 = 1.5 or 150%.
[186] Qwest Initial PAP Brief at page 17.
[187] Qwest Initial PAP Brief at page 18.

- 50% limiter in the Kansas 271 application as approved by the FCC.

Several CLECs objected to the 100% limiter.[188] Z-Tel said that the Qwest argument on this issue improperly seeks to introduce the number of misses into a measure that does not and cannot use the number of misses to measure performance. As Z-Tel notes, the thing being measured is the average length of an interval. Moreover, according to Z-Tel, Qwest's truncation of payments at 100% ignores the sound principle that what Qwest pays should increase as the divergence between its performance for itself and its performance for CLECs increases. Z-Tel said that eliminating Qwest's truncation is necessary to make sure that, as the severity of Qwest's non-compliant performance increases, so will the financial consequences associated with it. AT&T commented that the FCC did not approve the Texas plan limiter at the time of 271 approval; the Texas state commission approved the cap thereafter.[189]

Discussion: Several CLECs did correctly criticize Qwest's description of the alternate CLEC proposal as providing compensation for "phantom orders" or for more orders than CLECs had actually placed. That was not a fair criticism of the alternate proposal supported by a number of CLECs, and the use of a term that can be described as pejorative did not shed helpful light on a difficult issue.

Turning to what is more directly pertinent, Z-Tel noted in its brief that there is a difference between providing all CLEC orders on an average of 2 days versus providing them on an average of 3 days. Z-Tel is correct, but it is also correct that the QPAP somewhat recognizes this issue already. The problem, if there is one, is that the QPAP stops recognizing the difference at a certain point. The conceptual reason that the QPAP does so is sound. In order to reflect the volume of CLEC business, the QPAP must make the payment somehow volume sensitive. Otherwise, if: (a) CLEC A has 50 monthly orders, (b) CLEC B has 2,000 monthly orders, (c) the required interval to be met is 1 day on average, and (d) the average interval Qwest meets for both is 2 days, then Qwest would make the same payment to each, even though CLEC B has experienced vastly more occasions of delay, lengths of delay, or both.

Volume issues make it necessary to reflect somehow in the payment calculations the number of occurrences involved. The CLECs who oppose the QPAP's truncation implicitly accept this need, but they do not explicitly acknowledge it. In this regard, there is some irony in their allegations that Qwest's approach improperly seeks to introduce the concept of occurrences where it does not fit mathematically. The better argument against Qwest's approach is that it fails to measure both the number of individual misses and then to assign a severity level to each of those individual misses. That is what it might do in a perfect world.

No CLEC who objected to the QPAP's 100% truncation took this tack. Rather, having accepted the mathematical anomaly with which the QPAP begins, they chose instead a truncation approach as well; i.e., to cut off Qwest's continued use of per-occurrence based thinking on a measure that does not tell us anything about occurrences. To demonstrate, if a CLEC has 10 orders and if the average Qwest interval for serving them

[188] AT&T Initial PAP Brief at page 26; ELI/Time Warner/XO Utah Initial PAP Brief at page 14; Z-Tel Initial PAP Brief at page 9.
[189] AT&T Initial PAP Brief at page 27.

is 2 days, we have no way of knowing (to list but two examples out of a vast number of possible ones) whether each of the 10 was served in 2 days, or if 9 were served in 1 day, while the other was served in 11 days. Yet this is precisely the kind of distribution information we would need to know if we were to accomplish what is the logically correct thing to do if the CLECs are right, which is to pay only for the misses and to create and pay for each miss according to an intelligently arrived at scale that escalates payments for the degree of the miss.

What we have here is a need for arithmetical compromise to fit the quality of the data we have to work with under this measure. It is clear that the CLECs, despite what look like arguments for mathematical purity, in fact propose merely a different sort of impurity. There is not a factual or logical basis for believing that it comes closer to ultimate reality than does the one Qwest proposed. Notably, methods like those proposed in the QPAP here exist in other plans examined by the FCC.

It may well prove to be the case that the actual distribution of numbers of misses and their extent makes the QPAP a less effective motivator of compliant performance than some other formula might. Evidence addressing number and length distribution would, in that presumed case, have gone a long way to supporting CLEC claims that different QPAP treatment would be appropriate to detect and to sanction poor performance. As we have none here, no change is yet appropriate. However, such distribution information and any recommended QPAP changes resulting from it should be open to consideration during plan amendment processes.

I. Assigning Severity Levels to Percent Measures

Z-Tel argued that the severity of the consequences of missing a standard expressed as a percentage (e.g., percent of loops installed within the required interval) differs according to what that standard is. As Z-Tel put it, there is a difference in severity between missing a 60% standard by 5% and missing a 90% standard by that same 5% amount. Z-Tel proposed a payment formula that it said would make compensation more proportional to the relative size of the "miss" involved.[190] Covad made a similar point.[191]

Qwest presented an analysis to support its claim that the Z-Tel proposal could provide exorbitant payments to CLECs. This analysis showed that Qwest would have been required to pay in excess of the 36% annual total cap in just the four-month period from February through May 2001, had the QPAP been fully effective at that time.[192] Qwest considered this result to be particularly extreme, given that Qwest's evidence showed that it met 92% of all performance standards during that period.[193] Qwest also noted that Z-Tel's witness disclaimed support for the particular formula values included in Z-Tel's comments (and based on which Qwest performed its analysis); the Z-Tel witness stated at hearings that the weighting proposal should rather be considered as conceptual in nature. Qwest's reply brief argued that the PAP already provides for increased payments as performance diverges more from the required standard. Qwest asserted the principal

[190] Z-Tel Initial PAP Brief at page 12.
[191] Covad Initial PAP Brief at page 30.
[192] Qwest Initial PAP Brief at page20.
[193] Qwest Initial PAP Brief at page21.

difference between the QPAP and the Z-Tel proposal was not one of whether there was an increase in payments, but rather how fast that increase would occur.[194]

Z-Tel's reply brief argued that its witness had not retreated from Z-Tel's recommended approach, but had only recognized that the values to be used in its proposed formula could be changed to manage the degree of difference in payments that it would produce, in comparison with those of the current QPAP.[195]

Discussion: The dispute between Qwest and Z-Tel over this measure did not focus on the correctness of Z-Tel's formula in capturing the severity of misses of performance measures expressed as percentages. Rather, the problem appears to be that the PEPP collaborative negotiated payment amounts that did not use this formula, and applying it now would have the effect of significantly increasing payment amounts. It would be inappropriate to graft the Z-Tel formula as proposed onto base payment amounts negotiated at the collaborative. Had it been clear then that the base penalty amounts would be subjected to such a formula, it is reasonably certain to conclude that Qwest would not have agreed to those amounts.

It is true, as Z-Tel suggests, that inserting different "A" and "B" values into the formula could substantially moderate its impact on the total payments that would be produced under Qwest's approach. Nevertheless, Z-Tel made a specific proposal that has been shown to produce results that are: (a) out of keeping with the negotiations at the PEPP collaborative, and (b) beyond reason in their financial impact. Had that proposal not so far overreached in its financial consequence, it might merit closer consideration for adoption at the present time. As it did, however, the forum for addressing QPAP changes on an ongoing basis should consider whether there are means for introducing the correlation Z-Tel seeks between payments and severity of misses, without unduly altering the total payment expectations that came out of the PEPP collaborative process.

It is not reasonable to expect the recommendation to be made here to fine-tune the QPAP's payment engine without the aid of input and comment from the whole range of interests who would be affected. In other words, open-ended, conceptual proposals were not looked on with favor. In this case, the better approach is to allow that consideration to be made in a forum better suited to a full and detailed examination of how differing formulas would affect all of the participants. The Qwest proposal for the present provides an adequate means to detect and sanction poor performance in meeting measures expressed as percentages. For the future, QPAP review and amendment procedures will provide a suitable place for full debate about and consideration of a more adequately defined Z-Tel formula.

VII. Self-Executing Mechanism

The QPAP provides for self-executing Tier 1 payments to CLECs and Tier 2 payments to states in amounts that are based on monthly performance results.[196] Qwest designed the Tier 1 payments to provide compensation to CLECS and to provide performance

[194] Qwest Reply PAP Brief at page 18.
[195] Z-Tel Reply PAP Brief at page 7.
[196] Qwest Initial PAP Brief at page 5.

incentives to Qwest; the Tier 2 payments address the Qwest incentives goal.[197] The payments under the QPAP will be provided monthly and they will not require any showing of harm.[198] In each month, payments would first go to Tier 1, with any excess over those, up to 1/12th of the yearly amount, going to Tier 2. Any excess Tier 1 and Tier 2 monthly amounts would roll forward for payment by the end of the year, subject to the annual cap.[199] We note that the cap and the payments must be Utah specific.

A. Dispute Resolution (Section 18)

Qwest's brief added a dispute resolution provision specifically applicable to the QPAP. It would allow the general SGAT dispute resolutions to apply, but only in the event of disputes arising under QPAP Sections 13.3, 13.3.1, 13.7, 13.9, 15.1, 15.2, and 15.9.[200] ELI/Time Warner/XO Utah said that the limitations on the QPAP sections to which dispute resolution provisions would apply begs the question of how other disputes under the QPAP get resolved. ELI/Time Warner/XO Utah would require all QPAP disputes to be resolved under the provisions of the SGAT or the applicable interconnection agreement.[201]

AT&T requested that the Texas plan language replace what Qwest proposed, and that the dispute resolution provision should apply to all the QPAP, not just the sections proposed by Qwest.[202]

Qwest argued that the limitation of the QPAP dispute resolution provisions to certain sections was appropriate, citing the existence of more than 170 CLECs operating in Qwest's region as reason to protect against the use of the procedures for "de minimis controversies." [203]

Discussion: Qwest has not proposed a dispute resolution mechanism for QPAP disputes that involve QPAP sections other than those it listed. All SGAT provisions, the QPAP included, require some method for independent resolution. Those resolution methods are not necessary (or appropriate) for changing the meaning of the SGAT or QPAP, but for interpreting what those provisions mean and how they should be applied when the parties differ. Qwest has accepted the use of the general SGAT dispute resolution provisions for the specified sections. Those provisions have no explicit exclusion for "de minimis" disputes, although there is no reason for concluding that disputes are likely to be less numerous or more substantial when applied to the SGAT. Neither should we here preclude dispute resolution in advance on a theory of presumed immateriality.

No reason has been shown why the general SGAT dispute resolution sections are any less suitable for addressing QPAP provisions beyond those listed by Qwest. Therefore, it should be clear that the dispute resolution provisions of the SGAT apply to QPAP disputes involving CLECs who use the SGAT in its entirety or act to make the QPAP part

[197] Qwest Initial PAP Brief at page 9.
[198] Qwest Initial PAP Brief at page 12.
[199] Qwest Initial PAP Brief at pages 13 and 14 .
[200] Qwest Initial PAP Brief at page 78.
[201] ELI/Time Warner/XO Utah Reply PAP Brief at page 14.
[202] AT&T Initial PAP Brief at page 9.
[203] Qwest Reply PAP Brief at page 54.

of their interconnection agreements (i.e., the unique dispute resolution provisions of interconnection agreements should not apply).

AT&T's recommendation should not be accepted, because the Texas agreement refers to dispute resolution procedures that are a function of Texas Commission procedural rules, and therefore may contemplate steps not applicable before the commissions participating here.

B. Payment of Interest

The proposed QPAP did not provide for interest on late QPAP payments, or on payments that end up being deferred to a later period. Qwest agreed that interest at the one-year Treasury rate would be appropriate on late payments, provided that the same rate would apply to overpayments and to underpayments.[204] AT&T noted this statement, but observed that Qwest had offered no provision incorporating it into the QPAP.[205] AT&T also recommended that each state's statutory interest rate be inserted in lieu of the one-year Treasury rate, which AT&T said was likely to be low.[206]

Discussion: Payment delayed is certainly payment partially denied after the time value of money is considered. Qwest's proposal goes only part of the way to address this problem. It falls short insofar as it applies the United States Government's cost of money, when the value that must be replaced is that of commercial telecommunications entities. Their cost of money includes a mix of equity, long-term debt, and short-term debt. The Utah Commission set a cost of money for Qwest (US West) in the "last" rate case (1997). This rate shall be used for the purposes described in this section. The QPAP should provide for such interest on any payments received by the CLECs or State after the date due for any reason.

C. Escrowed Payments

Covad objected to allowing Qwest to avoid current payment obligations by claiming exclusions. Covad argued that Qwest should either have to pay pending dispute resolution or to make payments to an interest-bearing escrow account.[207] Having agreed to pay interest, Qwest objected to being required to place funds in escrow pending dispute resolution.[208]

Discussion: The provision for interest, absent concerns about credit-worthiness, resolves the issue of the time value of money for the present, because there is not at present a need for concern about credit-worthiness in the case of Qwest. However, there would be no harm and some potential benefit in including a provision that would allow a party to require the other to make payments into escrow where the requesting party can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty.

[204] Qwest Initial PAP Brief at page 39.
[205] AT&T Initial PAP Brief at page 13.
[206] AT&T Reply PAP Brief at page 16.
[207] Covad Initial PAP Brief at page 43.
[208] Qwest Initial PAP Brief at page 77.

D. Effective Dates

1. Initial Effective Date

AT&T and WorldCom asked that the QPAP become effective when a state public service commission issues its consultative report. The goal of this recommendation is to prevent backsliding while the FCC considers a Qwest 271 application.[209] ELI/Time Warner/XO Utah and Covad also argued for making the QPAP effective essentially immediately.[210]

Qwest proposed that the QPAP be effective state-by-state as of the date when Qwest may receive FCC 271 approval in each. Qwest proposed this date because it offered the QPAP as a means for assuring compliance after it gets such approval, and because there are significant issues concerning the statutory authority of the state commissions to order its application under state law, independent of section 271 considerations. Qwest said that the QPAP is self-executing; it does not even require a complaint. Qwest said that no CLEC has demonstrated that the laws of any of the nine states provide the authority necessary for a commission to compel the adoption of the QPAP as a requirement under state law.[211]

Qwest also said that there are sufficient methods for addressing Qwest performance pending FCC consideration of a 271 application. Qwest said that there already exists an opportunity for states and CLECs to supplement the record made in these workshops with evidence that is current through the date that they can present comments to the FCC.[212] Qwest also argued that it will have more than sufficient incentive not to backslide while its 271 application is pending before the FCC. Qwest also said that Covad erred in arguing that the Telecommunications Act of 1996 gives states authority to impose self-executing payment programs.[213] Qwest also objected to the Covad claim that Qwest's consent to impose the QPAP generally could be inferred; Qwest cited the explicit condition it has placed on its agreement to be bound; i.e., its prior receipt of in-region, InterLATA authority under section 271.[214]

ELI/Time Warner/XO Utah said that the issue of commission authority to order institution of the QPAP was not material, because the commission role in approving SGATs and checklist consulting to the FCC would allow it merely to withhold approval or endorsement failing Qwest's agreement to make the QPAP effective immediately. At the least, ELI/Time Warner/XO Utah said, the commissions should require monthly reports of payments that would have resulted under the QPAP, had it been in effect earlier than 271 approval.[215]

Discussion: Qwest's consent to the immediate effectiveness of the QPAP cannot be implied from any action it has taken. However, such consent is not necessary, because the issue at hand is not whether commissions can implement something like the QPAP

[209] AT&T Initial PAP Brief at page28; WorldCom Initial PAP Brief at page 16.
[210] ELI/Time Warner/XO Utah Initial PAP Brief at page19; Covad Initial PAP Brief at page 6.
[211] Qwest Initial PAP Brief at page 80.
[212] Qwest Initial PAP Brief at page 84.
[213] Qwest Reply PAP Brief at page 42.
[214] Covad Initial PAP Brief at page 5.
[215] ELI/Time Warner/XO Utah Reply PAP Brief at page 10.

under their own authority. The issue more accurately stated is whether the commissions should tell the FCC that they consider the QPAP sufficient to meet the public interest standard even if it is not made effective prior to FCC approval of a 271 application.

In that context, we note that PAPs were not part of the landscape when BOC obligations were being addressed in the context of mediations, arbitrations, and SGAT approvals. No participant has cited FCC support for such a thing outside the context of 271 approval. The very reason cited by the FCC in support of the adoption of a PAP is the need for assurance that local exchange markets will remain open after Qwest may receive the power to provide in-region interLATA service. Given the reasonably long history of operating without PAPs in the pre-271 context and given the purpose ascribed to them, it is logical to conclude that it should become effective when Qwest applies to the FCC or when the QPAP proposes, absent special circumstances.

The only circumstances cited were by the New Mexico Advocacy Staff, which argued that there is a risk of deteriorating performance, because Qwest can present a dated record of more adequate performance to the FCC, while allowing more current performance to deteriorate. No other special circumstances were cited; for example, there were no claims that Qwest's wholesale performance history to date was of a nature that would require unique or special inducements. This risk can be mitigated by requiring Qwest to make the QPAP effective contemporaneous with its FCC application.

There remains the issue of whether Qwest should report performance and presumed payment levels between now and any grant of 271 approval. That recommendation is sound. It will provide focus to the interim performance information that was of concern to the New Mexico Advocacy Staff. It will also be helpful in accommodating CLECs to the QPAP reports, to their independent confirmation efforts, and to the general relationship that exists between the performance they are receiving and the payments they are getting. The QPAP should therefore require Qwest to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

2. "Memory" at Initial Effective Date

AT&T said that when the QPAP becomes effective it should effectively calculate performance for as many prior months as are necessary to provide that escalated, rather then baseline, payments apply from the first month. Otherwise, said WorldCom, there would be insufficient incentive to Qwest and a failure to meet the FCC requirement that poor performance be sanctioned when it occurs. [216] Qwest said that this proposal is no different conceptually from one recommending the imposition of the QPAP's payment requirements before 271 approval.[217]

Discussion: Having decided that the QPAP should be limited to performance post-dating section 271 application and that other remedies apply before that time, and thereafter for CLECs not opting into the QPAP for compensation purposes, it would be inappropriate to start the QPAP payment structure in "mid-stream." Otherwise, the effect would be to mix remedies inappropriately, given that CLECs retain for the historical period in

[216] AT&T Initial PAP Brief at page 24.
[217] Qwest Initial PAP Brief at page 84.

question whatever remedies are applicable under their existing interconnection agreements.

3. PAP Effectiveness if Qwest Exits InterLATA Market

AT&T and ELI/Time Warner/XO Utah would continue the QPAP payment obligations should Qwest exit the in-region, interLATA market.[218]

Discussion: For the same reasons that the QPAP should only be effective upon entry by Qwest into that market, it should terminate upon the end of Qwest's authority to serve that market.

E. QPAP Inclusion in the SGAT and Interconnection Agreements

WorldCom said that Qwest failed to address the question of how the QPAP should be made a part of the SGAT, which requires commission consideration of the issue.[219]

Discussion: There does need to be some SGAT context for the QPAP and there should also be clarity about the scope of what a CLEC with an interconnection agreement would be required to elect. Qwest's 10-day comments on this report should address these issues.

F. Form of Payment to CLECs

The QPAP provides for QPAP payments to be made by bill credit, rather than by cash or check. Qwest argued that it would not be administratively more efficient to provide for payment by check. Qwest agreed to commit to a sample bill credit format, which it said would obviate any concern about the ability to identify the source and calculation of the credits.[220] Qwest also said that the QPAP already provides for the use of wire transfers in cases where a CLEC's PAP credit exceeds the amount it owes Qwest.[221]

WorldCom recommended that QPAP payments be made by monthly checks.[222] Covad requested that payment forms be limited to cash or check. Covad also asked that there be no offset of any payments due for unrelated debts of CLECs.[223]

Discussion: The CLEC arguments about the administrative convenience of requiring payment by the equivalent of cash were not persuasive. They missed the point that it would be inappropriate to require Qwest to make payments to CLECs in cases where CLECs were not current in paying Qwest for the same kinds of services. The QPAP provision is appropriate; it provides for a cash-equivalent transfer when there is not a sufficient CLEC amount due to offset the credit. Covad's concern about other CLEC debts is not pertinent here. The crediting approach applies to the bills issued under the SGAT or interconnection agreement. Any other arrangements between Qwest and a CLEC must be addressed by the terms of those agreements, not the QPAP. However, if

[218] AT&T Initial PAP Brief at page14; ELI/Time Warner/XO Utah Initial PAP Brief at page 21.
[219] WorldCom Initial PAP Brief at page 3.
[220] Qwest Initial PAP Brief at page 39.
[221] Qwest Reply PAP Brief at page 28.
[222] WorldCom Initial PAP Brief at page 14.
[223] Covad Initial PAP Brief at page 40

agreement (covering different services) allows offset rights that would extend to the QPAP, the provisions of that agreement would apply. The reason is that the QPAP should not be read as overriding any other agreement except where explicitly required or otherwise reasonably necessary.

However, Qwest must make the credit in a timely manner. Interest may need to be calculated as part of the bill credit amount (but not part of the capped amount) if the billing due date does not match the QPAP due date. We invite the parties to address this issue in their 10 day comments.

The QPAP should require Qwest to provide credit information in substantially the form of the sample it provided as Exhibit S-9-QWE-CTI-4, absent commission consent to change it.

VIII. Assurances of the Reported Data's Accuracy

Qwest recited a number of means for providing assurances that the performance data underlying QPAP payments will be reliable. Qwest cited the following:

- The underlying performance measures will have been audited twice by the time that the QPAP becomes effective
- The QPAP includes a root cause analysis provision
- The QPAP includes a risk-based audit program
- CLECs may request their raw calculation data from which to verify Qwest's results, and to request audits of individual performance measures.
- The QPAP provides for audits of the Qwest financial system used to calculate CLEC credits.[224]

The following paragraphs address these related means of assuring the accuracy of the data.

A. Audit Program

Qwest said that it modeled the QPAP audit provisions after the Texas plan, and that it included the concept of risk-based auditing, as proposed in the report by The Liberty Consulting Group (Liberty) recommending the adoption of an ongoing monitoring program. Qwest's conception of a risk-based auditing program would include audits triggered by measurements that change from manual to mechanized techniques and audits of measurements that have a high degree of risk, as substantiated by Liberty's report. Such measurements will be identified by the auditor and will be scheduled for audit over a two-year cycle. Qwest sought the right to select the auditor in order to assure consistency of results and efficiency in the conduct of the audit program across its 14 state region. Qwest argued that comprehensive annual audits would waste resources,

[224] Qwest Initial PAP Brief at page 6.

particularly in light of the fact that CLECs could initiate audits to address any concerns that may arise in the future.[225]

Qwest argued that CLEC-initiated audits should be subject to limitation and that their costs should not be chargeable to Qwest in the absence of audit findings that would raise material concerns. Qwest proposed to limit CLEC-initiated audits to two per year, with each audit covering no more than two performance measures. Qwest noted that the number of CLECs involved could produce audits of "dozens" of measures each year. Qwest also proposed that the CLEC-initiated audits be performed by the same auditor selected to perform the risk-based auditing to which Qwest agreed.[226]

Qwest also said that the QPAP's root-cause analysis provision, taken from the Texas PAP, provides a reasonable means for assuring that problems reaching an established threshold level will be examined.[227]

Qwest opposed the recommendation by WorldCom that Qwest should bear at least half of all CLEC audit costs, regardless of whether the audit finds a material deficiency. Qwest also noted that the Colorado Special Master's Final Report[228] included limitations on measurements subject to routine audits.[229] Qwest also opposed the Covad recommendation[230] for audits of all "high" weighted QPAP measures that Qwest has failed regularly to meet, arguing that accuracy of the data, not degree of success in meeting the measure, is the key to deciding whether an audit is appropriate.[231] Covad argued that there is no reason to limit CLEC-requested audits; they are self-limited by the requirement that CLECs pay for them if they do not uncover material problems. Covad also argued that the standard of materiality for use in determining audit cost responsibility should be 5% of the amount of QPAP payments to the CLEC.[232]

Qwest argued that it should retain the internal control to manage the processes that it uses to make performance measurements. Qwest said that its change management governance process includes strict controls and that it will post to an external website material changes affecting the processes, methods, and activities related to producing performance measurements and reports. Qwest considered it inappropriate to require prior commission approval of its ability to change data gathering processes or to work around temporary problems or errors it finds in making measurements.[233]

AT&T and WorldCom proposed elimination of the restrictions on the number of special audits that CLECs could request. AT&T would also eliminate the authority of Qwest to request audits of CLEC data.[234] AT&T also considered it inappropriate to disallow overlap in CLEC-requested audits.[235] The QPAP allows Qwest the right to select the

[225] Qwest Initial PAP Brief at page 57.
[226] Qwest Initial PAP Brief at page 58.
[227] Qwest Initial PAP Brief at page 62.
[228] At pages 5 and 6.
[229] Qwest Reply PAP Brief at page 37.
[230] Covad Initial PAP Brief at page 46.
[231] Qwest Reply PAP Brief at page 38.
[232] Covad Reply PAP Brief at page 12.
[233] Qwest Initial PAP Brief at page61
[234] AT&T Initial PAP Brief at page 15; WorldCom Initial PAP Brief at page 13.
[235] AT&T Initial PAP Brief at page 16.

independent auditor; AT&T and WorldCom argued that this right was inconsistent with the need for independence.[236]

WorldCom's reply brief recommended two specific changes, which it said would provide for greater state public service commission control over the QPAP's operation:

- Allowing CLECs to request additional audits to be conducted by the commissions
- Allowing CLECs to conduct additional audits when they can show cause for them.[237]

WorldCom also recommended a collaborative, i.e., multi-state, audit program, and objected to any provision that would limit public service commission powers to request performance-measure audits.[238] Covad generally recommended the adoption of the auditing language of the Colorado Special Master's Report.[239]

Discussion: The issue here is one of providing sufficient assurance that a high level of confidence can be placed in the performance results that Qwest measures – results that will drive QPAP payments and that will serve as a primary basis for state public service commission oversight of wholesale performance. It is perhaps not helpful to approach this issue by providing a simple "thumbs up" or "thumbs down" to each specific auditing or data-testing element proposed by Qwest or CLECs. A sound data auditing and testing program should consist of an integrated and complementary set of tools; it would be difficult to craft an effective yet non-duplicative approach by cobbling together individual elements from the multiple proposals we have here.

We begin by concluding that the QPAP does provide for some of the key elements of a sound program, but fails to create an effective and efficient overall program that will provide adequate assurances of the continuing accuracy of underlying performance data. It suffers from certain gaps that would make it unreasonably difficult to identify potential changes of consequence, it does not assure continuing attention to data accuracy indefinitely out into the future, and it provides Qwest a degree of control over the program that is not fully consistent with the need for complete independence of the data auditing and testing program.

Therefore, we propose the adoption of an integrated program in response to the concerns raised by many participants. It takes much from the Liberty monitoring recommendations and from the Colorado Special Master's Report, changing each to respond to constructive arguments and suggestions raised both by Qwest and the CLECs who commented on this issue. The QPAP should be amended to explicitly provide for a program incorporating the elements described in the following paragraphs.

Given the nature of Qwest services and performance measurement systems and processes, it is reasonable to conclude that there will be substantial commonality among the states. It would be appropriate for the QPAP to support common efforts to provide the assurances that Qwest's measurements remain reliable. All stakeholders will suffer,

[236] AT&T Initial PAP Brief at page 16; WorldCom Initial PAP Brief at page 12.
[237] WorldCom Reply PAP Brief at page 5.
[238] WorldCom Initial PAP Brief at pages 12 and 14.
[239] Covad Initial PAP Brief at page 46.

should there be a need to participate in and respond to as many as 14 different ongoing testing programs, because:

- Qwest will face significant added cost and resource burdens as a result of the duplication that will be inevitable
- CLECs will face the need to address the same or closely related measurement problems in many different forums
- State commissions will face the need for a significantly greater use of their own individual resources to oversee monitoring and auditing efforts and to resolve disputes about them.

Each state needs to retain the ability to assure attention to its particular needs and circumstances. This objective can be met without unnecessary duplication of testing efforts by designing and implementing them on a common basis. A proper program should consist of the following activities:

- Providing for a transparent Qwest process for changing the systems, processes, methods, and activities by which Qwest takes measurements under established performance measures ("Qwest's measurement regimen"); i.e., allowing an opportunity for others to challenge such changes
- Adopting a programmatic approach that will provide for both pre-planned and as-needed testing of material aspects of Qwest's measurement regimen.

This two-part program recognizes the following principles:

- Qwest's measurement regimen has undergone a thorough audit and will also have to pass FCC muster before 271 approval would be granted
- All other things being equal, continuing to apply the Qwest measurement regimen will provide sufficient assurances that measured wholesale results remain sufficiently accurate
- Insofar as the Qwest measurement regimen remains static, it will be necessary to examine periodically how and how well Qwest continues to apply it
- In addition to the periodic reviews, which should be of indefinite duration (but sensitive to the findings of preceding test work) to be effective, in the short term it is appropriate to examine the areas that the performance measures audit, the ROC collaborative OSS test, and the FCC's review find to be areas of particular risk or instability
- Qwest should retain the power to make measurement processes more accurate or more efficient to perform without sacrificing accuracy
- Those changes should be at Qwest's initial discretion, but subject to sufficient visibility to allow challenges to the propriety of any changes to be made.

With respect to the transparency of changes, we should first recognize that what Qwest considers to be a material change might differ from what others believe. There should be a process for brief, regular meetings (once per quarter will suffice) between Qwest and the independent auditor (whose selection and responsibilities are more fully discussed

below). These meetings should not include other parties. Their purpose should be to allow Qwest to report on and the auditor to ask questions about changes made in the Qwest measurement regimen. The meetings would then produce reports by the auditor to the commissions and, where the commissions deem it appropriate, other participants.

The results of the meetings would permit the auditor to make an independent assessment of the materiality and propriety of any Qwest proposed change, including, where necessary, testing of the change details by the auditor. These meetings would supplement, but not replace the other change management and notification methods by which Qwest would make other parties aware of what it considered to be significant changes to its measurement regimen. Other parties would be free to communicate with the selected auditor any concerns about such changes.

With respect to auditing and testing, Qwest has accepted the two-year planning cycle proposed by Liberty as part of its performance measures audit. Liberty's recommended approach contemplated the adoption of a formal plan identifying the specific aspects of performance measurement to be tested, the specific tests to be conducted, and the entity to conduct them. Central to the planned and cyclical approach is that higher risk areas should be audited more frequently, but that even lesser causes of risk should periodically be tested. Each two-year cycle would examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined.

The first year of each successive cycle would concentrate on areas most likely to require follow-up in the second year. Near the end of each two-year cycle, planning for the next cycle would commence. The short-term needs of the period immediately following any 271 approval can be handled, if they are not addressed as part of the completion of the ROC collaborative OSS auditing and testing process, and can be incorporated into the plans for the first cycle. Absent an unusual level of adverse findings and conclusions, it would be expected that audit work would reduce in total magnitude across the first several cycles, falling in that case to the level appropriate for a mature and well-functioning measurement regimen. The other major factor expected to influence test work magnitudes is the degree to which Qwest makes changes to its measurement regimen.

Cycle planning should be conducted under the auspices of the participating commissions, with detailed planning recommendations to be made by an outside auditor retained for two-year periods. The auditor should be selected by the participating commissions, if for no other reason, because one of the auditor's tasks will be to recommend the assignment of cost responsibility for CLEC-requested audits. Neither Qwest nor CLECs should choose auditors whose responsibilities include determining whether they should bear potentially significant audit costs. Moreover, the selected auditor must be one with whom all participants are comfortable discussing issues and concerns, which will sometimes prove material to the design of test activities. Commission selection is most likely to produce the communications climate that is most appropriate to the circumstances at issue here. Finally, we believe that assuring both the reality and the appearance of independence in the auditor's test work calls for retention by the commissions, who should be considered the clients for whom the test work is performed.

The audit planning and auditor retention work should provide for Qwest and CLEC input to the commissions, in order to promote their confidence in the work to be performed and the resources performing it. In some cases, however, the audit plan might require confidentiality for certain test activities where advance notice could compromise their efficacy.

Another role of the auditor should be to assess the need for individual audits proposed by CLECs. Those audits should be available for CLEC-specific concerns or issues not otherwise addressed by the plan for the current cycle. Qwest's testimony recognized the need to avoid unnecessary duplication, but its method of minimizing it was arbitrary. The independent auditor should review CLEC requests for audits, with dispute resolution available to any party questioning the auditor's recommendation. Absent dispute, the auditor would carry out any CLEC-requested audits whose need the auditor accepted; the parties could ultimately accept or challenge results or the determination of need for the audit through available dispute resolution methods. The auditor's tasks should include determining:

- General applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation)
- Magnitude of any payment adjustments required
- Cost responsibility for the tests performed, with the test being the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment).

The states can address their individual needs during the planning process, and they can, should they choose, commission additional testing in the event that a commonly derived plan fails to meet their needs. It is not anticipated that such a unilateral approach will be often requested or required.

Payment of audit program costs constitutes a sound use of Tier 2 payments. Qwest should fund in advance the costs of the first two-year cycle, with amounts to be refunded from Tier 2 payments as they accumulate. In the event that this Tier 2 funding should prove insufficient to meet the requirements of the program, half of any uncompensated amount advanced by Qwest should be returned from the ensuing two-year cycle's Tier 1 escalated payments, to be shared by CLECs according to their pro rata share of Tier 1 escalated payments from that prior cycle. Qwest will absorb any leftover amounts not capable of recompense out of Tier 2 and escalated Tier 1 payments as described above.

B. PSC Access to CLEC Raw Data

QPAP Section 14.2 authorizes Qwest, upon Commission request, to provide CLEC raw data to that commission. Qwest said it would be inefficient for commissions to follow the CLEC approach, which would be to ask the CLECs directly for the information. Qwest would agree to provide it to the commissions as confidential, subject to whatever decisions the commission later made with respect to continuing confidential treatment.[240]

[240] Qwest Initial PAP Brief at page 78.

AT&T asked that Section 14.2 be stricken from the QPAP, because there is not provision for maintaining confidentiality.[241]

Discussion: Public service commissions have legitimate needs for the data at issue. There is no sound reason for requiring them to undertake the potentially significant burdens of seeking it from individual CLECs. Each state has existing procedures for the treatment of confidential information. Moreover, each state should retain existing authority to determine what kinds of information ultimately will remain confidential. We have already addressed a similar issue regarding the provision of confidential CLEC data to public service commissions in connection with the thirteenth unresolved *General Terms and Conditions* issue (*Access of Qwest Personnel to Forecast Data*) in the *General Terms and Conditions, Section 272 & Track A Report* issued on September 21, 2001 in these workshops. There, we recommended language for SGAT Section 5.16.9.1.1. Similar language should be inserted into the QPAP, specifically:

> *Pursuant to the terms of an order of the Commission, Qwest may provide CLEC-specific data that relates to the QPAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.*

C. Providing CLECs Their Raw Data

AT&T recommended a deadline of two weeks from a CLEC's request for Qwest to provide a CLEC with its specific data relevant for QPAP measurement and payment purposes.[242] AT&T said that the lack of an explicit deadline could leave Qwest free to provide the data well after CLECs need it.[243] Qwest objected to AT&T's request that it be obliged to provide the data to CLECs on a firm (as opposed to a mutually agreed to) schedule. Qwest said that such a request would fail to respond adequately to the factors (e.g., timing or volume of data requested) that could materially affect the time in which it could reasonably be provided.[244]

Covad said that it requires the computer code and process information underlying CLEC data in order to reconcile its performance measurements with those of Qwest.[245]

Qwest opposed AT&T and Covad proposals involving Qwest's website for posting CLEC-specific results and data, arguing that its proposal should be considered purely voluntary because no other BOC has been obliged to offer such a capability.[246]

WorldCom asked that Qwest be required to maintain electronic access to underlying records for three years, and to keep records in an archived state for an additional three years.[247]

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[241] AT&T Initial PAP Brief at page 28.
[242] AT&T Initial PAP Brief at page 29.
[243] AT&T Reply PAP Brief at page 21.
[244] Qwest Initial PAP Brief at page 63.
[245] Covad Reply PAP Brief at page 14.
[246] Qwest Initial PAP Brief at page 60.

Discussion: Qwest should be obligated to provide the data as soon as it feasibly can. More specific deadline language would not respond to the need for flexibility given the size or nature of the requests that Qwest may face. Nothing in the QPAP limits those requests sufficiently to justify firm response deadlines.

The QPAP should provide retention periods for underlying records. The three years recommended by WorldCom appears at first blush to be a very long period, considering the kinds of information and the potentially vast amounts of it. However, we must recognize that the auditing and testing work to be made a part of the QPAP may uncover not only needs for future changes, but may lay a basis for CLEC requests for recalculation of prior payments. The QPAP should allow payments to be recalculated retroactively for three years (from the later of the provision of a monthly credit statement or payment due date) and it should require Qwest to retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculation efforts should be made reasonably contemporaneously with Qwest measurements. Thus, it is sufficient to require Qwest to maintain the records in a readily useable form for one year; it is sufficient if the remainder of the required records is retained in archived format.

While the use of a web site may prove useful, there is no evidence to support a conclusion that it is the only acceptable way, or that it would even provide significant advantages over other methods. Covad's request for computer code and process information is overly broad. The QPAP, however, should include a provision providing that Qwest's distribution of CLEC-specific data must be in a form that will allow CLECs to be able to identify its nature and content, and will be in a form that will allow CLECs to undertake the same kinds of calculations performed by Qwest.

D. Late Reports

WorldCom proposed the following payment schedule for late, incomplete, and incorrect reports:

- $5,000 per day for late reports
- $1,000 per day for incomplete reports
- $1,000 per day for reports later revised by Qwest
- $1,000 per day for reports for which a CLEC cannot gain access to its data underlying the reports due to reasons within Qwest's control.

WorldCom said that its proposal would not unduly penalize Qwest, which already has under the QPAP a five-day grace period and an opportunity to escape penalties when it can show that the cause of the delay was outside its control. WorldCom also noted that the Texas commission set a $5,000 per day payment for Texas alone, even though SBC also served in other states that could apply additional penalties.[248]

[247] WorldCom Initial PAP Brief at page 14.
[248] WorldCom Reply PAP Brief at page 3.

Z-Tel proposed a $100/day payment for each report that is late, rather than the QPAP's flat $500/day no matter how many are late.[249] Covad argued that not only late reports, but also inaccurate ones should require payments.[250] AT&T ultimately proposed the adoption of the Texas approach, which would include the higher payments noted above, and would also eliminate the grace period provided for in the QPAP. AT&T also said that CLECs are damaged by late reports, which include data that CLECs need to make timely assessments of service that they are being provided.[251]

Qwest defended the QPAP Section 14.3 per-day late report payment of $500 as providing sufficient incentive to report on time, after considering the number of states for which payments would be required and the relationship between payment amounts and the number of days that reports are late. Qwest cited as an example the $70,000 total payment that would apply across the 14 states for a report filed 10 days after the end of the QPAP's grace period.[252] Qwest noted that the CLEC proposal to apply the penalty to each report (counting unique CLEC and state reports) could produce a $4.2 million payment for the same 10-day example that would cost Qwest $70,000 under Section 14.3 as now written.[253]

Qwest said that WorldCom was in error in asserting that the Texas plan included the revision or data access payments. Qwest also said that the $5,000 per day payment would yield a $700,000 (10 times the QPAP amount) for a single monthly set of reports that were filed 10 days after the end of the grace period.[254] Qwest also said that the CLEC proposals provided compensation well out of proportion with the harm to them, because QPAP payments were due independently of a report's filing, and CLECs could still get access to their underlying data and request audits, regardless of whether reports arrived on time.

Discussion: There is no support in the Texas plan for the imposition of liquidated payments for reports that are inaccurate or for failures to provide underlying CLEC data. The Texas plan requires payments for reports that are late or incomplete. For each missing measure, the Texas plan would impose a penalty of one-fifth the amount for failure to file any report at all. Reports with omissions have diminished value. The one-fifth factor of the Texas report, subject to a cap equal to the daily amount for failure to file any report should be incorporated into the QPAP in order to give adequate strength to the late-report provision.

Requiring payments for inaccurate reports is troublesome. The QPAP consists of a vast number of measures; it is not realistic to expect that no report would ever contain a measure that will later require restatement. CLEC proposals provide no guidance in determining what is an adequate level of accuracy; i.e., the level at which no payment would be required and the payment scale that would properly correlate to the severity of any inaccuracy.

[249] Z-Tel Initial PAP Brief at page 34.
[250] Covad Initial PAP Brief at page 45.
[251] AT&T Reply PAP Brief at page 16.
[252] Qwest Initial PAP Brief at page 37.
[253] Qwest Initial PAP Brief at page 38.
[254] Qwest Initial PAP Brief at page 38,

Moreover, the QPAP should encourage correction where warranted, not discourage it by imposing potentially severe penalties. The better way to deal with the accuracy of reports is to include the issue of report accuracy into the risk analysis that will be used to formulate audit plans.

Similarly, liquidated payments for an inability to meet deadlines for providing a CLEC with its specific data are not warranted. The auditing program should consider CLEC-specific and CLEC-aggregate data in its planning. If there is a persistent failure to provide CLEC-specific data, there will be reason to address its causes in audits, given that such a failure is all but certain to raise questions about the accuracy of the measurements that Qwest makes.

We come now to the question of payment levels. Z-Tel proposes a remedy that would produce penalties that are unreasonable on their face. The Texas payment approach bears a much closer relationship to what is reasonable. The $500 payment that Qwest proposes is not much money when compared with the amount of time and effort that will be necessary to produce QPAP monthly reports. Payments at that level may be sufficient to deal with small delays, but should escalate over time. Recognizing that the QPAP already includes a grace period of one week, the payments should escalate as follows:

- Second-week reports: $500/day
- Third-week reports: $1,000/day
- Subsequent-week reports: $2,000/day.

Qwest remains protected against undue growth in payments by virtue of its ability to seek a waiver of late-report payments.

IX. Other Issues

A. Prohibiting QPAP Payment Recovery in Rates

AT&T argued that there should be specific language precluding QPAP recovery in rates. AT&T recommended its language, because Qwest has proposed none.[255] Qwest said that language is not necessary, because the FCC has already made it clear in prior 271 orders that PAP payments may not be recovered in interstate rates, noting that the New York Commission made a similar determination at the state level.[256] Qwest also noted that the requirement that wholesale rates be set according to prescribed FCC pricing methods also precludes the inclusion of QPAP payments in SGAT or interconnection agreement prices.[257]

Discussion: We believe that neither the FCC nor the state commissions require guidance in how or when to determine what to do about QPAP payment recovery in rates.

[255] AT&T Initial PAP Brief at page29; WorldCom Initial PAP Brief at page 4.
[256] Qwest Initial PAP Brief at page 72.
[257] Qwest Reply PAP Brief at page 47.

B. No-Admissions Clause

ELI/Time Warner/XO Utah and Covad argued that measurements under the PID and payments based on them should be admissible as evidence in other proceedings; they would delete QPAP Section 13.4.1.[258]

Discussion: The objective information set forth in the performance reports is indeed strong evidence of the characteristics of Qwest's performance. The use of that information to show what Qwest's performance actually was should not be constrained. The QPAP does not do so. The Section 13.4.1 restrictions apply only to the existence of the QPAP and to the making of payments thereunder. Given the multiple purposes of the QPAP and given the availability of the underlying performance data for use as evidence, this narrowly drawn provision constitutes a reasonable approach.

C. Qwest's Responses to FCC-Initiated Changes

Qwest cited three proposed QPAP changes that Qwest said came from informal FCC input, and that Qwest noted were not objected to or commented upon at the hearings on the QPAP:[259]

- Eliminating two families of OP-3 sub-measurements, so that no missed order would go uncompensated (accomplishable by striking footnote "c" to QPAP Attachment 1)
- Removing the adjustment for Commission rate orders, which adjustments had the effect of reducing the total amount at risk under the QPAP
- Making two changes in the statistical values used to test Tier 2 parity measurements.

Discussion: There were no objections to these changes by any participant. They should be incorporated into the QPAP.

D. Specification of State Commission Powers

Section 12.3 provides that a state commission may recommend to the FCC that Qwest be prohibited from offering in-region interLATA services to new customers in the event that the annual cap is reached.

Discussion: Apart from the QPAP, commissions may recommend such relief for innumerable reasons other than the fact that Qwest reaches the cap. They may also recommend other relief when Qwest reaches the cap. It is self evident that this section is utterly valueless in providing commissions with any power that they do not already possess. Therefore, it could only be read as an indication that commissions approving the plan have agreed in advance that they would self limit their authority to respond to future circumstances. That not being the case, the provision should be stricken, in order not to cloud the legitimacy of or weight to be given to any future commission action other than the ones recited in the QPAP.

[258] ELI/Time Warner/XO Utah Initial PAP Brief at page23; Covad Initial PAP Brief at page 44.
[259] Qwest Initial PAP Brief at page 40.